Ross, William 1809 76

ABRIDGEMENT

OF THE

LAWS OF SCOTLAND

RELATIVE TO

HUNTING AND FOWLING;

DOVE-COTS AND PIGEONS,

RIVERS, THE SEA-SHORES, AND FISHINGS,

PLANTING AND INCLOSING;

Compiled from the moſt celebrated writers on the Scots Law, the Acts of Parliament, and Deciſions of the different Courts.

"INDOCTI DISCANT, AMENT MEMINISSE PERITI."

"CONTENT, IF HERE, TH' UNLEARN'D THEIR WANTS MAY VIEW,
"THE LEARN'D REFLECT ON WHAT BEFORE THEY KNEW."

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MONTROSE:
Printed by DA. BUCHANAN.

1800.

From the Compiler

to

Captain Elder

a trifling testimony of his high
gard and respect.

Montrose
3d. Jany 1845

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JUN 22 1931
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TO

SIR DAVID CARNEGIE

of Southesk, Baronet,

MEMBER OF PARLIAMENT FOR THE COUNTY OF FORFAR,

AND THE

OTHER GENTLEMEN ASSOCIATED

FOR THE PRESERVATION OF THE GAME ON THEIR ESTATES IN THE COUNTIES OF

FORFAR AND KINCARDINE.

GENTLEMEN,

PRESUMING upon the honour you have already conferred upon me in chooſing me your common agent for the purpoſe of carrying into effect your joint reſolutions for the preſervation of the Game on your eſtates ſituated in this neighbourhood, I now uſe the freedom of inſcribing to you the following pages.

Diſappointed to find your reſolutions not attended with all the good effects which might naturally have been expected from them, I propoſed to myſelf to have publiſhed in hand-bills the principal offences againſt the Game and the applicable penalties; hoping that by diffuſing a more general knowledge of the laws on the ſubject, the country people would be the more inclined to diſcover offenders and the purpoſes of your aſſociation be thus attained. While reviſing the different ſtatutes for this purpoſe, it occurred to me,

me, that it might perhaps be agreeable to yourſelves to have a ſhort ſummary of theſe laws; prompted by a deſire to meet your wiſhes, though conſcious of my inability to execute ſuch a work in the manner it ſhould be, I now offer the reſult of my efforts to do ſo in this publication. It's ſubſequent parts are ſo intimately connected with the ſubject of the firſt, that the one would hardly be complete without the reſt; and the whole has ſo much exceeded the bounds originally propoſed, that I have ventured, under your patronage, to ſubmit to the attention of the public in general and of the landholders and ſportſmen of this Country in particular, what was at firſt intended for your information alone.

Aware that whatever I might advance without giving my authority, would not deſerve that credit which a work of this ſort muſt bear along with it to be of any uſe, I have thought it adviſeable, however affected or pedantic it may appear to ſome, to give the names of the authors to whom I am indebted for the whole of this compilation. There are indeed ſeveral anonymous paſſages, with regard to which I think it likewiſe neceſſary to mention that their whole merit ſhould be aſcribed to PROFESSOR HUME of the Municipal Law of Scotland, in the Univerſity of Edinburgh, while their inaccuracy, if any ſhall be found, muſt be altogether attributed to the incorrectneſs of my notes from the Lectures of that learned lawyer. Every thing in ſhort, which I have pretended to inſert of my own, is ſtated merely as a doubt, query, or remark naturally ariſing from the ſubject.

It may occur to many that a number of the laws enumerated

enumerated in this work, eſpecially with regard to the Game, are now obſolete, and that the rigour of others of them defeats their object. Whether the ſpirit of the preſent times be ſo much altered from that of the age in which theſe ſtatutes were paſſed, as to render it improper that they ſhould be now enforced, is a queſtion which falls to the province of the Judges of the land to determine; but one of the greateſt writers on our law, lays it down as a maxim on this ſubject, that "*poſteriores leges ad priores pertinent*, "*niſi contrariæ ſunt.*" Notwithſtanding this general rule however, and keeping altogether out of view the difference of the times, it may perhaps be argued againſt the execution of ſeveral of our Acts of Parliament on this ſubject, that their intention ſeems to have been to preſerve the Game, not ſo much as a branch of the royal prerogative or the property of any particular claſs of individuals, as for the food of man; a purpoſe for which they certainly cannot now be applied, the very uſing of that ſpecies of food by unqualified perſons, without the expreſs permiſſion of thoſe entitled to do ſo, being of itſelf an offence ſeverely puniſhable; yet there ariſes this advantage at leaſt, from the old laws being retained in ſo far as not ſuperſeded by thoſe poſterior, that from the choice of ſtatutes to proceed upon thereby given to one wiſhing to make an example, it is put very much in his power to make the puniſhment ſlight or ſevere, according to the demerits of the offender. But without entering into any diſquiſition on the motives of the legiſlature in making ſuch regulations, or on their propriety and equity now that they are paſſed into laws, the whole are given here in the order they appear in the ſtatute books: and however

ever rigorous ſome of them may appear, it ſhould be attended to, that in the neighbouring country, where ſurely as great attention is paid to the liberty of the ſubject as in any other, they are not only much more numerous and ſevere, but the whole code is far more rigidly enforced than with us.

However much Game laws in general may be inveighed againſt, or whether thoſe of this kingdom be really ſubject to cenſure or not; the laws relative to Planting and Incloſing, it is preſumed, will meet the common approbation. Now that the encouragement of agriculture and the improvement of the face of the country have become matters of ſuch national concern, it is doubtleſs to be wiſhed that the proviſions already made for the attainment of theſe objects ſhould be better promulgated and more attended to than they have of late years been. Many of theſe and of the Game laws are ſo intimately connected together, that an infraction of the one neceſſarily implies a breach of the other. Aſſociations of the landed intereſt for the purpoſe of enforcing a due obſervance of both have lately become very frequent, and if this performance ſhall be found at all ſerviceable in promoting the views of ſuch aſſociations and of your's, GENTLMEN, in particular, I ſhall feel myſelf amply compenſated for any trouble it has coſt me: but whatever may be its fate, whatever reception it ſhall meet with from others, I have already had ſufficient experience of your partiality to induce me to truſt that from you at leaſt, it will obtain every indulgence which can reaſonably be expected to the firſt attempt of one, who has been induced to publiſh,

from

from no other motive than his anxiety to ſhew himſelf, by his attention to whatever is committed to his charge, not altogether unworthy of your countenance, and who eſteems himſelf fortunate in having this opportunity of publickly expreſſing the Gratitude and Reſpect with which he is

Gentlemen,

Your much obliged and

moſt obedient ſervant,

WILLIAM ROSS junr.

Montroſe, 25th Decr. 1800.

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PART

PART I.

OF THE

GAME LAWS OF SCOTLAND,

RELATIVE TO

HUNTING AND FOWLING.

CHAPTER I.

Of the Right of killing Game at Common Law.——Reaſon aſſigned for the eſtabliſhment of the Game Laws.——Legal qualification to kill Game.——Detail of the Regulations of the Stamp Act.——How far qualified Sportſmen are entitled to kill Game any where.

BEFORE entering into a detail of the Statute Law, on this ſubject, it may be proper to conſider on what footing the right of killing Game ſtood originally at Common Law. In the time of King Alexander (the Second, we believe, who began to reign in 1214) no man was prohibited to hunt hare, fox, or other wild beaſt, wherever found, unleſs in Foreſts and Warrens.

Erſkine when treating of this ſubject, lays it down (B. 2. p. 1. § 10.) that by the common law of Scotland, every one acquires the property of wild beaſts, fowls, or fiſhes as ſoon as he kills, or apprehends them, whether upon his own grounds or thoſe of another: for they can belong to no perſon wherever they may be, while they retain their natural liberty; and conſequently muſt become the property

of him who firſt ſeizes them. The right of hunting, fowling, and fiſhing, is indeed reſtrained by ſtatute in many caſes, under fixed penalties, but all Game tho' caught in breach of theſe Acts or within another man's property, belongs, by the neceſſity of law, to him who has ſeized it. The prohibition therefore in theſe ſtatutes can have no other effect than to inflict a fine on the treſpaſſer, unleſs, where the confiſcation of what is caught makes part of the ſtatutory penalty.

Many reaſons have been aſſigned for thus reſtricting by ſtatutes the right of killing Game. As plauſible a one as any ſeems to be that alledged by Warburton in his Alliance between Church and State, viz. that "it was not at all for the public good to "ſuffer peaſants and mechanics to run up and down "the woods and foreſts armed, which in time thro' "their idle habits, and domeſtick diſtreſſes, draws "them on to robbery and brigandage; nor to per-"mit the populace in towns and cities, to have and "carry arms at their pleaſure, which would give op-"portunity and encouragement to ſedition.*"

In enumerating the ſtatutes which have reſtricted the common law on this ſubject, it will be neceſſary to look a good way back, for *Lord Bankton* ſays (B. 4. t. 17. § 15.) that with regard to the old enactments on this head, the rule holds "poſteriores leges ad "priores pertinent, niſi contrariæ ſunt."

The firſt thing which naturally falls to be conſidered, is what now gives one a title to purſue and take Game in this country. The firſt inſtance of this right being mentioned in a Crown Charter, is in one of the 14th century, by Robert Bruce, to his ſon Colin Campbell the root of the preſent Argyle family. The Act which preſently regulates the point is chap. 31 of

* See likewiſe Blackſtone's Commentaries, B. 2. c. 27, and Boyd's Juſtice of Peace, B. 1. t. 11.

the Parl. 1621, ordaining, that no man hunt or hawk hereafter, who hath not *a plough of land in heritage*, under the penalty of 100l. (8l. 6s. 8d. ſterling,) the one half to the King, the other half to the informer.

This Act and all former ones made for preſerving the Game, were ratified by 1685, c. 20*; and ſo lately as the year 1780, theſe two ſtatutes were found by the Court of Juſticiary to regulate this point: it was then accordingly determined that "the "appellant having more than *a plough-gate* of land "*in property*, has a right and is qualified by the law "of Scotland, to hunt, ſubject to all the regulations "of the Game."

It is to be wiſhed that a clearer definition had been given of the extent of land which it is requiſite for one to be poſſeſſed of to entitle him to this privilege, as it is not ſpecified in the report of the above caſe, either how much land the defender was poſſeſſed of, or how much is included in a plough-gate. *Skene* in his book "*De Verborum Significatione*, voce, CARRUCATA TERRÆ," derives it from the French *charru*, and defines it to be ſuch a meaſure of land as may be laboured within year and day by one plough; but as this muſt depend ſo much upon the ſtrength of the cattle and nature of the ſoil, ſuch an explanation does not at all obviate the difficulty †.

* This Act appointed Maſters of the Game for every County, with great powers to ſee the laws enforced. The Earl of Southeſk was the Maſter of the Game for Forfarſhire and the Earl Mariſhal for Kincardineſhire, but the appointment was for ſeven years only and was never revived.

† It may perhaps be not unacceptable to know the different interpretations which have been given to this expreſſion by Engliſh lawyers. Cowell in his *Interpreter*, ſays, a plough-gate is the ſame as a hyde of land, for the meaning of which he quotes the following

There is another eſſential requiſite which every one without diſtinction muſt now obtain in order to be duly

following authorities: "a certain quantity of land, ſuch as might "be plowed with one plough in a year, *Termes de la Loy*. By "others it is 120 acres, by Bede who calls it *familiam*, it is as "much as will maintain a family: others hold it to be four yard "land. Crompt, in his *Jur*. fol. 220, ſays it contains 100 acres, "every acre in length 40 perches, and in breadth 4, every perch "16½ feet: and again fol. 222, a hide of land contains 100 "acres, and 8 hydes or 800 acres make a knight's fee. But "Coke on Littleton, fol. 69, ſays that a knight's fee, a hide or "plough-land, a yard land, or ox-gang of land contain no certain "number of acres. The diſtribution of England by hydes of "land is very antient, mention being made thereof in the laws of "King Ina, c. 14. and Henry I. to marry his daughter to the "Emperor, took of every hyde of land 3s. *Spelman*." There are as many opinions about the ſum thus raiſed as about the extent of ground which contributed the 3s. See Hume's Hiſtory, v. I. note m. p. 517. Cowell among other definitions of the term *knight's fee*, ſays, it contains "12 plough-lands, or 600 acres," conſequently a plough-land conſiſts of 50 acres: this is on the authority of Coke, though he was before quoted in ſupport of the opinion that it contains no certain number of acres. "Stow, in his Annals, ſaith" continues Cowell, "there were found in England at the time of the Conqueror, 60,211, or by others 60,215 kinght's fees:" let us ſtrike the medium and call it 60,213 which at 600 acres each, makes 36,127,800 acres in the whole of England; but in the laſt edition of Guthrie's Geography, England is ſaid to contain 79,712 ſquare miles, and to have been divided at the time of the Conqueſt into 62,000 knight's fees of 4 hides each: conſequently, the number of miles 79,712=62,000×4 or 248,000 hides. But 79,712 miles=49,215,680 acres, therefore, according to Guthrie, 1 hide=49,215,680÷248,000, or 198$\frac{2}{10}$ acres.

"Non noſtrum eſt, tantas componere lites."

Yet if Crompton's opinion be adopted that a hide is 100 acres, and 800 acres a knight's fee, and Guthrie's ſtatement taken as to the number of theſe in England, the reſult will be found not greatly to exceed the meaſurement of the kingdom given by the latter author.

It is not however a matter of ſuch conſequence in England as it is

duly qualified to kill Game with impunity. A tax was firſt impoſed upon this amuſement in the year 1784. By the Act of that year every ſportſman was required to pay 2l. 2s. annually to authorize him to avail himſelf of the other legal qualification juſt taken notice of, and 10s. 6d. annually to qualify a Game-keeper. By an Act of the following Seſſion, this tax was put under the juriſdiction of the Commiſſioners for the Stamp Duties, and by 31 Geo. III. c. 21. (A. D. 1791) the former duties were increaſed to 3l. 3s. for a ſportſman's certificate and 1l. 1s. for that of a Game-keeper. This laſt ſtatute confirms almoſt all the other proviſions in the former Act the moſt material of which to our ſubject are the following.

Sect. 2nd. No perſon ſhall take or deſtroy Game, until he has delivered in an account of his name and place of abode to the Sheriff or Stewart Clerk of the County, Stewarty, &c. where ſuch perſon ſhall reſide, and annually take out a certificate thereof; and for which certificate he ſhall pay annually a ſtamp of 3l. 3s. Game keepers are ſpecially excepted and they will get a certificate for 1l. 1s. upon recording their deputation.

Sect. 5th. The Sheriff Clerk ſhall ſign and deliver certificates to every perſon requiring the ſame; and, in caſe of neglect or refuſal, ſhall forfeit 20l. ſterling for each offence.

Sect. 6th. Every ſuch certificate ſhall bear date on the day of the month on which the ſame ſhall be iſſued, and ſhall endure and remain in force from thence until the firſt day of July next following the date thereof and

is in this country to have the exact contents of a plough-gate of land aſcertained, for there, the qualification to hunt is otherwiſe regulated, though in one reſpect, perhaps juſt as indefinitively, viz. being the eldeſt ſon and heir apparent of *an Eſquire*, or perſon *of ſuperior degree*. Burns' Juſtice, voce Game.

and no longer; and any ſuch Sheriff Clerk who ſhall iſſue any certificate contrary to this Act ſhall forfeit and pay the ſum of 20l.

Sect. 8*th.* Every perſon, who ſhall after the firſt day of July 1785 ſhoot at or kill any Game without a certificate ſhall forfeit 20l.

Sect. 9*th.* Game keepers neglecting to take out certificates for the ſpace of 20 days next after the date of their deputation, are made liable to the ſame penalty.

Sect. 12*th.* Alphabetical liſts of all who have taken out certificates are to be kept at the office of the Sheriff Clerk, &c. and may be inſpected by any perſon whatever on payment of One Shilling and no more.

Sect. 14*th* When a proprietor of land ſhall make any new deputation of a Game-keeper; upon it being regiſtered and a new certificate obtained thereon, the firſt certificate is to become null and void, and the perſon acting under it, *after* notice is given to him of the new and other certificate, is to be liable to the penalties preſcribed by this Act, in the ſame manner as if no certificate had been ever granted to him.

Sect. 15*th.* Any perſon in purſuit of Game, who ſhall refuſe to produce his certificate when required by any other perſon who hath obtained a certificate in the manner herein before directed, and who produces ſuch certificate himſelf; or who ſhall refuſe to tell his name and place of abode, or ſhall give in any falſe or fictitious name, or place of reſidence ſhall forfeit and pay the ſum of 5ol.

From the nature of this clauſe, we beg leave to ſuggeſt the propriety of every ſportſman carrying out his certificate with him.

Sect. 16*th.* The certificates thus iſſued are declared to give no authority to any perſon to take or deſtroy Game at any time or in any manner prohibited by any law now in being; nor do they give a right to any perſon

perſon not duly qualified by law to take or deſtroy Game. *They authoriſe ſuch perſons only as were before qualified.*

Sect. 17*th.* No certificates obtained under any deputation of a Game-keeper who ſhall uſe any greyhound &c. or any gun &c. for the taking or deſtruction of Game beyond the precincts of the lands for which ſuch deputation was given, ſhall be of any avail.

Sect. 19*th.* Perſons counterfeiting or forging ſtamps or procuring them to be counterfeited and forged, or who ſhall utter, vend or ſell any vellum, parchment, or paper, with a counterfeit mark or ſtamp thereupon, knowing ſuch mark or ſtamp to be counterfeit, ſhall ſuffer death as felons.

Sect. 21*ſt.* All pecuniary penalties impoſed upon any perſon or perſons for offences committed againſt this Act in Scotland may be recovered in his Majeſty's Court of Seſſion, Court of Juſticiary, or Court of Exchequer by action of debt &c. and wherein the plaintiff, if he or ſhe ſhall recover any penalty or penalties, *ſhall recover the ſame for his or her own uſe, with coſts of ſuit.*

Sect. 22*nd.* The Juſtices of the Peace are required to take cogniſance of offences againſt the Act, and upon due proof of the offence, either by the voluntary confeſſion of the party, or by the oath *of one or more* credible witneſſes, to give judgment for the penalty or forfeiture.

Sect. 23*d.* Perſons ſummoned as witneſſes by the Juſtices and not appearing ſhall forfeit 10l.

Sect. 25*th.* The Juſtices are reſtricted from mitigating the penalties ſo that they be reduced to leſs than a half, over and above the plaintiff's coſts and charges.

Sect. 26*th.* Nothing herein contained ſhall be conſtrued to extend ſo as to ſubject any perſon whatſoever to a longer impriſonment than *three calendar months*, for non-payment

non-payment of any fine or penalty to be impoſed under the authority of this Act.

Sect. 28th. If any perſon ſhall be ſued, *moleſted or proſecuted*, for any thing by him done or executed in purſuance of this Act, and if upon the trial the plaintiffs become non ſuited, then ſuch defendant ſhall recover *treble coſts*.

Having thus explained what is now conſidered neceſſary to entitle any one to kill Game in his own right, we ſhall endeavour to ſhew next, how far the powers of one ſo qualified extend.

It has been lately made a doubt, ſays *Erſkine*, whether a perſon ſo qualified to kill Game, may hunt or ſhoot within another man's property without a treſpaſs; and indeed the Act of 1707, c. 13, which prohibits all without exception to come within their neighbour's property with "ſetting dogs and nets," without the proprietor's conſent, ſeems to take it for granted that a perſon qualified may hunt in any ground with hounds or grey-hounds, or ſhoot with a fowling piece, provided he does not uſe a net: but ſurely, he adds, ſuch privilege carries with it a moſt ſevere limitation upon property; and beſides hath a manifeſt tendency to deſtroy the Game; the preſervation of which our lawgivers ſeemed to have ſo much at heart, B. 2. t. 6. § 6.

Bankton thus expreſſes himſelf on the ſubject. Every heritor may hunt and fowl upon his own ground (this we preſume, muſt now be underſtood as applicable to thoſe only whoſe lands extended to a plough-gate,) and none other is entitled to do ſo without his conſent. B. 4. 17. 15.

However this right may have ſtood at common law, it appears that penal ſtatutes were neceſſary to enforce it. Thus, by Parl. 1555, c. 51, it was ordained that none *hawk or hunt*, in their neighbours corns, from Eaſter till the ſame be ſhorn, that none *ride nor gang* through wheat any time of the year; that none range in woods, parks, hainings, (i. e. a particular

ticular ſort of broom,) within dikes or brooms, without licenſe of the owner of the ground, under the pain of refundment of the damage done, and 10l. (16s. 8d. ſterling,) to the King for the firſt fault, 20l. for the next, and eſcheat of moveables for the third tranſgreſſion: this Act was ratified by 1685 c. 20., and in the year 1778 both were declared by the Court of Seſſion to be ſubſiſting laws, and ſufficient for the deciſion of the queſtion touching the right of a qualified ſportſman hunting within the incloſed grounds of another, without his permiſſion. This queſtion occurred betwixt the Marquis of Tweedale and Hugh Dalrymple, &c. and the deciſion of the Court was, that "the defenders are not entitled to "enter or come into the deer park *or other incle-* "*ſures* of the purſuer, without his conſent, either for "hunting or following Game, or drawing cover and "ſearching for Game."

Upon conſidering the terms of this judgment one might be inclined to think that it is the incloſures only of another which a qualified ſportſman is debarred from entering. In the year 1790 however, it was determined in the ſame Court, that they had no title to come upon *the waſte grounds* of another without his permiſſion; but the defenders were not ſubjected to the ſtatutory penalties, and indeed we do not know of any Enactment affixing any penalty to ſuch a tranſgreſſion.

CHAPTER II.

Poacher who.——Provisions applicable to them.——Exception with regard to Fox Hunting.——How far an Heritor is entitled to seize a Poacher's Gun, &c.——Particular provision as to Officers and Soldiers.

ALL who presume to kill Game without being possessed of the legal qualifications just taken notice of, are termed Poachers. Custom indeed seems to have excepted from this class, those who have furnished themselves with a stamped certificate and obtained the permission of the proprietor of the ground; but it is a point worthy of particular consideration, whether such a permission, without being accompanied by a regular deputation as a Game-keeper, can do more than free the person who kills Game in consequence of it, from the penalties levelled against such as come upon the grounds of others without permission. The Act of 1621 restricting this right to proprietors of a plough-gate of land alone, certainly prohibits all others and confers on the former no power to communicate their exclusive privilege. Without entering farther here into the discussion of this question, we shall proceed to enumerate the provisions of the Legislature to protect the Game from all not possessed of the qualifications it points out.

The Act 1555, it may have been observed, applies equally in several respects to all persons without distinction. By 1707, c. 13. it is enacted that no *common fowler* shall presume to hunt on any grounds without a *subscribed* warrant from the proprietor, under the penalty of 20l (1l. 13s. 4d sterling) half to the discoverer, and half to be at the disposal of the Judge before whom the offence shall be cognosced, besides forfeiture of the dogs, guns and nets, to the apprehenders or discoverers: and farther provided, that no fowler *or any other person whatsoever*, shall come within any

any heritor's ground without leave aſked and given by the heritor, with ſetting dogs *and nets*, for killing fowls by nets; and *if any common fowler* ſhall be found *in any place*, with guns *or nets*, having no licenſe from any nobleman or heritor, *he ſhall be ſent abroad as a recruit.*

Several remarks ſuggeſt themſelves upon the terms of this ſtatute.

The expreſſion, "common fowlers" found here, and in ſeveral of the other Acts, *Boyd* tells us, means in general any perſon who makes a practice of killing and ſelling Game.

The penal part of the ſtatute merits particular attention, as it was owing to a miſconception of its import, that the Earl of Eglintoun loſt his life in his rencounter with Campbell the Exciſe Officer; for though Campbell was found guilty of murder, it was not becauſe he had no right to defend his fowling piece, but upon the principle that it is murder to kill in defence of a fowling piece, one who advances to ſeize it, not from any felonious intention, but from a miſtaken notion that he has a right to do ſo; nor is it ſufficient to excuſe or mitigate, that the ſlayer retired before the aggreſſor and did not fire his piece till he fell. *M'Laurin's Criminal Cases.* This famous caſe was decided in the year 1769, and it had been previouſly determined by the Court of Seſſion in the year 1753, that an heritor qualified to kill Game, had acted unwarrantably in ſeizing *brevi manu*, the fowling piece of a common poacher, and he was ordained to reſtore it in as good condition as when he got it.

The forfeiture of guns, dogs and nets, then, it would appear, is not to be incurred till after conviction, and as there is no mention made of the Game which may have been killed, in this or any other of the Acts on the ſubject, excepting that of the Parl. 1685, appointing Maſters of the Game, long ago obſolete in this reſpect; we conclude from the doctrine laid down

by *Erſkine* in the paſſage firſt referred to, that the Game killed by Poachers becomes their abſolute property.

Moreover, with regard to the penal part of the ſtatute, it ſhould be attended to, that the general prohibition againſt entering the grounds of another without permiſſion applies to *qualified persons* in ſo far only as they do ſo with ſetting dogs *and nets, for killing fowls by nets;* and even then no particular penalty is annexed to ſuch an offence; but the certification of being ſent abroad as a recruit applies to *common fowlers* wherever found, with either guns *or* nets.

The Act proceeds to require all Sheriffs of Shires, Stewarts of Stewarties, Juſtices of Peace, Bailies of Burghs, &c. to put the ſame in due execution under the penalty of 100l. (8l. 6s. 8d. ſterling,) to be decerned by the Lords of Seſſion to the purſuer or complainer, upon an inſtrument being taken by him, that the Judge applied to refuſed *or delayed* to cognoſce the complaint according to law, and to decern in the terms of this Act: and it concludes with a ratification of all the former Acts made anent the Game, in ſo far as not thereby altered.

So much for poachers preſuming to hunt; it ſhall by and by be inveſtigated how far the law takes hold of them for preſuming merely to have game in their poſſeſſion without permiſſion; but before leaving this ſubject, a curious enough exception to the above Act falls to be noticed. It was decided by the Lords of Seſſion in the year 1785, that ſome farmers who had clubbed together *for the purpose of destroying foxes*, were entitled to go upon the grounds of others for that purpoſe upon indemnifying the proprietors for the damages they might thereby ſuſtain*. This action proceeded upon an Act of Parl. for the preſervation of fences, to be particularly taken notice of under that head.

There

* Yet in the former caſe of Sir Hugh Dalrymple, the plea of Fox-hunting was over-ruled.

There is a particular regulation on this ſubject with regard to Officers and Soldiers. It was firſt enacted by the 8. Annæ 3. 10, and has been repeated in every annual Mutiny Act ſince that period, that *any* Officer, who, without leave of the lord of the manor under his hand and ſeal firſt had and obtained, ſhall take, kill or deſtroy, any hare, coney, pheaſant, partridge, pigeon, *or any other ſort of fowls, poultry, fiſh*, or his Majeſty's Game, within the kingdom of *Great Britain*, and be convicted thereof upon oath of one or more credible witneſs or witneſſes, before any Juſtice or Juſtices of the Peace, ſhall, for every ſuch offence, forfeit the ſum of 5l. ſterling to be diſtributed among the poor of the place where ſuch offence ſhall be committed; and every Officer commanding in chief upon the place, *for every ſuch offence committed by any Soldier under his command*, ſhall forfeit the ſum of 20s. to be paid and diſtributed in manner foreſaid: and if ſuch Officer ſhall refuſe and neglect to pay the ſaid reſpective penalties, within two days after conviction and demand made thereof by the conſtable or overſeers of the poor, he ſhall forfeit his commiſſion, which is thereby declared to be null and void.

CHAPTER III.

Of the manner and ſeaſon of killing the different ſorts of Game.—— Of unqualified perſons having Game in their poſſeſſion at any time.— Of Muir-burn.——Of hunting or fowling undernight, on Sunday or Chriſtmas day.

THE utmoſt pains ſeem to have been long taken by the Legiſlature to preſerve the antient cuſtom of hawking. The chap. 9. of Parl. 1551, goes ſo far as to denounce the puniſhment of death and confiſcation of moveables, againſt all who ſhoot "with half-"bag, culvering or piſtolet," at deer, roe, or other wild beaſt or wild fowls. Traps and gins are prohibited

ed by ſeveral ſtatutes: chap. 58 of 1555, appoints fowlers who lie in wait with nets, to be puniſhed as the killers of deer, an offence to be ſoon taken notice of. Chap. 23 of 1600, prohibits the taking with girn or net any ſort of Game then in uſe to be chaſed with hawks, under the penalty of 100l.

The introduction of ſetting dogs, about the end of the 16th century, was as much diſcountenanced at firſt as the uſe of fowling pieces. The firſt Act at all tolerating the uſe of either is c. 20th of Parl. 1685, reſtricting the privilege to heritors of 1000l. valued rent and their domeſtic ſervants: this regulation was found to have gone into deſuetude ſince the Union, in the caſe which fixed the qualification at a plough-gate of land; but the uſe of fowling pieces appears to be ſtill reſtricted in one particular, it being enacted by 1707, c. 13. that *no persons whatever ſhall ſhoot hares* under the penalty of 20l. (1l. 13s. 4d. ſterling,) *toties quoties*; one half to the diſcoverer, the other half to be at the diſpoſal of the Judge before whom the offender ſhall have been convicted. Courſing or hawking therefore, we preſume, to be the only legal methods of killing hares, even by perſons qualified.

There are many ſtatutes in force regulating the ſeaſons of the year for killing the different ſpecies of Game. That none hunt or hawk in their neighbour's corns from Eaſter till the ſame be ſhorn; that none travel through wheat at any time of the year, without permiſſion &c., as ordained by 1555, c. 51, already noticed: that none kill deers kids under a year old, under the penalty of 10l. (16s. 8d. ſterling,) by 1474, c. 60, and by 1503, c. 69, the ſlayer of parked deer, roes or roe bucks "of Lordes proper woodes," is declared to be a point of dittay, and the unlaw thereof 10l. beſides indemnification to the party. "And "gif *ony child within age* commit ony of thir things "foreſaid, becauſe they may not be puniſhed for non-"age, their fathers or maiſters ſal pay, for ilk ane of "them,

" them, ilk time committing ony of the ſaid treſpaſſes, " threttene ſhillings four pennies (1s. 1d$\frac{1}{2}$. ſterling,) " or elſe deliver the ſaid child to the Judge to be " *leiſched*, ſcourged and *dung*, according to the fault." That none kill deer or hare *in time of ſnow* is enacted by 1621, 32. 1685, 20, under the penalty of 100l. (8l. 6s. 8d. ſterling) *toties quoties*, the one half to the King, the other to the informer. The 24th Geo. II. c. 34, proceeding upon the narrative of the great abuſes of *carriers*, poachers, and others carrying and ſelling the Game, ordains, that *no perſon in Scotland*, ſhall upon any pretence whatſoever, kill or deſtroy the particular ſorts of Game therein mentioned, during certain ſeaſons of the year, *and prohibits unqualified perſons from uſing or having Game in their poſſeſſion at all, at any time of the year*, without the leave of one qualified, under the penalties of 20s. ſterling for the firſt offence, and 40s. for every ſubſequent tranſgreſſion. The prohibited ſeaſons are enlarged by 1ſt Geo. III. c. 21, and in the year 1768, Matthew Fortune, and a number of other Vintners and Poultry Men in Edinburgh, were ſmartly fined by the Sheriff and the judgment confirmed by the Court of Juſticiary, for having in their poſſeſſion and uſing Game, contrary to the terms of the above Acts, though they had bought it at the publick poultry market. They afterwards obtained licenſes from perſons qualified but were again proſecuted and fined by the Sheriff; they appealed once more to the Court, when the Procurator Fiſcal, who was the proſecutor, dropped the proceſs. This caſe is very fully reported by *Boyd* in his " *Juſtice of Peace*," B. 1. tit. 11, and as it is notorious that Vintners uſe a great deal of Game, for which they moſtly depend upon common fowlers and poachers, we leave it to be conſidered how far the raiſing more frequently ſuch actions as the above, in which the offence was proved by the defenders oaths, might tend to the diſcouragement of poaching.

This

This proſecution and the two Acts upon which it proceeded are taken notice of here, merely to ſhew how rigorouſly theſe laws were enforced, yet a ſtill ſtricter ſtatute was ſoon after paſſed, proceeding upon the preamble, that the former laws were found by experience to be inſufficient; and repealing that of 24 Geo. II. to make room for the following regulations ſtill in force over Britain.

1ſt. Every perſon who ſhall wilfully take, kill, deſtroy, carry, ſell, buy, or have in his or her poſſeſſion, or uſe any muir-fowl or tarmargan, between the 10th of December and 12th of Auguſt, or any heath-fowl between the 10th December and 20th Auguſt, or any partridge between the 1ſt of February and 1ſt of September; or any pheaſant between the 1ſt of February and 1ſt of October, in any year, ſhall *for every bird* ſo taken, deſtroyed, carried, ſold, bought, found or uſed, forfeit and pay the ſum of 5l. ſterling, and failing payment within ten days after conviction, ſhall ſuffer impriſonment for two months for each 5l. ſterling of the penalties incurred.

2ndly. Every perſon whatſoever, *not qualified* to kill game in Scotland, who ſhall have in his or her cuſtody, or carry *at any time of the year upon any pretence*, any hare, partridges, pheaſants, muir-fowl, tarmargans, heath-fowl, ſnipes, or quails, without the leave or order of a *perſon qualified*, ſhall for the firſt offence, forfeit 20s. ſterling, and for the ſecond and every other ſubſequent offence, 40s. ſterling, and failing payment, within 10 days after conviction, ſhall ſuffer impriſonment for ſix weeks for the firſt, and for three months for the ſecond and every ſubſequent offence.

3dly. Every perſon who ſhall make muir-burn, or ſet fire to any heath or muir in Scotland, from the 11th of April to the 1ſt of November in any year, ſhall forfeit and pay the ſum of 40s. ſterling for the firſt offence, 5l. ſterling for the ſecond, and 10l. ſterling for the third, and every other ſubſeqnent offence: and

and failing payment within ten days after conviction, to ſuffer impriſonment for ſix weeks for the firſt, two months for the ſecond, and three months for the third and every other offence.

4thly. Where muirburn ſhall be diſcovered within the forbidden time, the occupiers of the ground ſhall be liable, unleſs they can bring proof againſt ſome other perſon.

5thly. Proprietors of high and wet muirlands, may burn heath thereon between the 11th and 25th April, or may authoriſe their tenants of ſuch lands to do ſo, by permiſſion in writing, to be firſt recorded in the Sheriff Court Books.

6thly. Juſtices of Peace as well as the Sheriff or Stewart Depute may enquire into offences againſt this Act, and determine the ſame by the oath or oaths of one or more credible witneſs or witneſſes, or by the confeſſion or oaths of the parties accuſed.

7thly. One half of all penalties and forfeitures incurred for any offence againſt this Act, ſhall be paid to the proſecutor, (any one may proſecute,) and the other half ſhall be applied to the uſe of the poor of the pariſh, or to the repairing of the high-roads within the pariſh where the offence ſhall have been committed.

Such are the regulations of the Act of the 13th Geo. III. c. 54. paſſed in the year 1773. The Act chapter 55 of the ſame Seſſion, which, we believe, alſo applies to the whole of Britain, alters the former in ſo far as regards the penalties, and enacts that no perſon, ſhall upon any pretence, wilfully take, kill, or have in his or her poſſeſſion or uſe, any heath-fowl commonly called *black game*, nor any grouſe, commonly called, *red game*: betwixt the 10th of December and 20th of Auguſt, nor any buſtard betwixt March 1ſt and September 1ſt in any year, on pain of forfeiting for the firſt offence, any ſum not exceeding 20l. nor leſs than 10l.; and for the ſecond and every ſubſe-

quent offence not exceeding 30l. nor leſs than 20l.; half to the informer and half to the poor; and failing payment, the offender to be impriſoned ſix weeks for the firſt offence, and two months for every ſubſequent one.

Chapter 80th of the ſame Seſſion makes the following further proviſions with regard to the time of killing Game: viz. That if any perſon ſhall knowingly and wilfully kill, take or deſtroy, or uſe any gun, dog, net, ſnare, or other engine *with intent* to take, kill, or deſtroy any hare in the night, that is betwixt the hours of ſeven at night and ſix in the morning from the 12th October to the 12th of February, or in the day time upon a Sunday or Chriſtmas day, he ſhall, upon conviction on oath of one witneſs, before one Juſtice, forfeit, for the firſt offence, a ſum not exceeding 20l. nor leſs than 10l, and for the ſecond offence, not exceeding 30l. nor leſs than 20l. In caſe of an information being made, upon oath, before a Juſtice againſt an offender, already convicted of a firſt and ſecond offence, the Juſtice may in this caſe, commit him to the common jail, or houſe of correction, till the next General Quarter Seſſions, unleſs he enter into recogniſance with two ſufficient ſureties, to appear at ſuch Seſſions, then and there to be tried by indictment for the ſaid offence. The Juſtice is alſo to bind over the informer to proſecute the ſaid offender, who, if convicted upon ſuch indictment, is to forfeit and pay the ſum of 50l. or upon neglect or refuſal ſo to do, to be committed to the common jail or houſe of correction, for not leſs than ſix nor more than twelve kalendar months, unleſs the penalty be ſooner paid. And if the Juſtice think proper, the offender may at the expiry of ſuch committment, be publickly whipped in the town or place where ſuch jail or houſe of correction ſhall be, betwixt the hours of twelve and one in the day. There can be no proceeding however upon this Act, unleſs information on oath be made before a

Juſtice

Juſtice, within a kalendar month after the offence: and the forfeitures, on all theſe offences are forthwith to be paid, *the one half to the iuformer*, the other half to the poor.

The ſame penalties are by the ſame ſtatute, enacted with regard to the taking, killing, or deſtroying any pheaſant or partridge, muir game or heath game, in manner foreſaid, or from the 12th February to the 12th October, betwixt the hours of nine at night and four in the morning.

An Act paſſed in the year 1796, repeals that part of the 13th Geo. III. which relates to partridge ſhooting; and in reſpect that the ſearching for and killing of partridges ſo early as the 1ſt September has been found very prejudicial to the corns, enlarges the prohibited ſeaſons till the 14th September.

Theſe are all the ſtatutes which we conceive to be in force in Scotland regulating the ſeaſons for killing the different ſorts of Game; and it is ſurely a curious circumſtance that in ſo many guarded and anxious enactments, not one proviſion is to be found (ſo far at leaſt as we have been able to diſcover,) for the protection of hares, excepting in time of ſnow, in the night time, on Sundays and Chriſtmas days. The Almanacks indeed make the ſeaſon of hare-hunting to be from the 30th Auguſt to the 1ſt of March, but we know not from what ſource the publiſhers have drawn this information. With regard to partridge ſhooting, they are certainly miſtaken in making it commence on the 1ſt September, unleſs the Act of 1796 has been repealed.

Herons are mentioned in ſeveral of the Acts for the preſervation of Game. Are they ſtill to be conſidered as ſuch?

CHAPTER IV.

Of deſtroying the Neſts and Eggs of winged Game.——Of buying and ſelling Game.——Of Stealing or detaining Sportſmen's Dogs.—— Abſtract of all the Offences againſt the Game cogniſable by Statute, and the penalties applicable thereto.

BEFORE leaving this ſubject, we have only to enumerate a few regulations for the preſervation of the neſts and eggs of winged Game, and againſt the buying or ſelling of Game. Our only reaſon for ſuppoſing that the proviſions relative to the firſt of theſe points are ſtill in force, is the general rule laid down by *Bankton* quoted in the firſt chapter, that the ſubſequent ſtatutes touching the Game have a reference to the former ones, in ſo far as they are not contrary to them.

By 1457 c. 84, it is ordained, that no man deſtroy the neſts or eggs of ſuch birds and wild fowl as are for the ſuſtentation of man, as *pertrickes, plovares, and ſick like foules*, nor ſlay wild fowl when they cannot fly: and chap. 59, of Parl. 1474, enacts, that no man take eggs *out of pertrickes nor wilde duik neſts*, under the pain of 40s. (3s. 4d. ſterling,) and the crime is declared to be a point of dittay (i. e. grounds for a Juſticiary trial.) The Act 1457 above referred to, likewiſe ſtatutes that all men after their power, deſtroy neſts and eggs of birds and fowls of *riefe* (i. e. *of prey*,) and when rooks and crows build their neſts in orchards &c., the heritor is inſtructed to allow them to build, but, "in na waies that their birdes "flee awaie, under the penalty of forfeiture of the "trees to the king, or payment of an unlaw of 5s. "and that the ſaid foules of reife all utterly be de-"ſtroyed be all manner of men, be all maner of ingine, "of all maner of crafts that may be founden, for the "ſlauchter

" ſlauchter of them, ſall cauſe great multitude of di-
" verſe kind of wilde foules for man's ſuſtentation."
Chapter 87 of the ſame Parl. requires the Sheriff to collect the country people three times in the year for the deſtruction of wolves during their breeding ſeaſon. Such as fail to attend are to forfeit a wedder, and on the other hand, every one who ſhall have killed a wolf is declared entitled to a penny from every houſeholder in the pariſh where the wolf was killed, upon carrying his head to the Sheriff. But as theſe regulations are foreign to our ſubject, we ſhall proceed to enumerate the laws againſt ſelling Game.

The Act 1600, 23. proceeds upon a preamble that owing to the remiſſneſs in the execution of former Acts for the preſervation of the Game, " diverſe per-
" ſons, having greater regarde of their gaine and
" commoditie, whilke they purchaſe by the ſelling of
" the ſaid wyld foull, *to ſick perſons wha prefers*
" *their awne inordinar appetite and gluttonie*, either
" to the obedience of the ſaids lawes, or to the recre-
" ation that may be had by the direct ſlaying of the
" ſamine; hes uſed all the ſaid indirect meanes in
" ſlaying of the ſaids wyld fowles and beaſtes, *where-*
" *by this country being ſo plentifullie furniſhed of before,*
" *is become altogether ſcarce of ſic waires*; for remeid
" whereof," all perſons whatſoever are prohibited from buying or ſelling in any wiſe, " any faſtan,
" reid, or fallow deare, daes, raes, hares, per-
" trickes, moore-fowles, black-cokes, aith-hens, *ter-*
" *migants*, wyld dukes, teilles, atteilles, goldings,
" mortyms, ſchidderems, ſkail-draik, heron, butter,
" *or any ſick kynde of fowles*, commonly uſed to be
" chaſed with halkes, under the pain of 100l.
" (8l. 6s. 8d. ſterling,) to be incurred als well by the
" buyer as the ſeller;" and in caſe of inability to pay, the offender to be ſcourged through the burgh or town where apprehended. Cunnings, wood-cocks, plovers and wild geeſe, are ſpecially excepted. This

Act

Act contains the fulleſt enumeration of winged Game that we have met with; its proviſions are ratified by 1685 c. 20. but for a term of ſeven years only, and we do not know that they have ever been ſince revived, excepting as to muir-fowl and partridges, which the Act of 1707 c. 13, prohibits to be bought or uſed within any burgh, village, *or private houſe*, during the prohibited ſeaſons, which were then from 1ſt March to 20th June with regard to the former, and to the 20th of Auguſt *incluſive* with regard to the latter, under the penalty of 20l. (1l. 13s. 4d. ſterling) *toties quoties*, one half to diſcoverer, the other to be at the diſpoſal of the Judge. This enactment is in a manner ſuperſeded by the Britiſh Act of 28th Geo. II. c. 12, which makes the following proviſions.

1ſt. That *all perſons* ſelling or expoſing to ſale *any Game*, ſhall forfeit for every hare and fowl, 5l. ſterling, to be levied by diſtreſs and ſale of their goods, the offence being proved by one witneſs before one Juſtice; one moitie of the forfeiture to the informer, and the other to the poor: and for want of diſtreſs, the offender to be committed to the houſe of correction for three months.

2nd. That Game found in the houſe or poſſeſſion of a Poulterer, Saleſman, Fiſhmonger, Cook, or Paſtry-Cook, ſhall be deemed expoſing thereof to ſale.

Qu. Does this Act apply to Scotland?

The preſervation of ſportſmen's dogs has been likewiſe an object of legiſlative care. Thus 1685, c. 21, enacts, whoever ſhall take a collar from a dog's neck with the maſter's name or ſtyle thereon, ſhall be fined in the ſum of 500 merks Scots, (27l. 15s. 6½ ſterling,) and whoſoever ſhall give away or ſell any dog, which is not his own, ſhall be fined 100l. (8l. 6s. 8d. ſterling,) as alſo whoſoever finds a dog ſtraying, having the collar above named, and who takes ſuch dog into his poſſeſſion, ſhall be obliged within 48 hours thereafter, to ſend and book the dog in the

Sheriff

Sheriff Clerk's books, by his kind, collar, and marks, for which there ſhall be paid to the Sheriff Clerk 6s. 8d. (6s. 8d. ſterling,) which the owner of the dog ſhall be obliged to repay, together with 2s. (2d. ſterling,) for each mile that the bearer ſhall be ſent to the Sheriff Clerk; and in caſe the dog be not claimed by letter or otherwiſe, by the juſt owner, within ſix months after it ſhall have been ſo booked, then he ſhall pertain to the poſſeſſor, and the owner ſhall not be heard thereafter to claim the ſame: and if the taker or keeper of the dog ſhall fail to cauſe book the ſame in manner above ſpecified, he ſhall forfeit the ſum of 40l. (3l. 6s. 8d. ſterling,) to the owners, if they ſhall purſue for the ſame before any Judge competent. Hawks are included in the Act.

Having now completed this tedious enumeration of ſtatutes, we ſhall cloſe the whole with what firſt ſuggeſted the idea of the preſent compilation, viz. the making an abſtract of all the forfeitures incurred by tranſgreſſions againſt the Game; the advertiſing the principal of which in hand bills, it is conceived, would prove as efficacious a method as any, to diſcourage poachers, and prompt the country people to lodge informations againſt them.

It will appear from the Table that an unqualified perſon is guilty of a threefold offence, and liable to a penalty for each by preſuming to kill Game during the prohibited ſeaſons: *ex. gra.* by killing black or red game, there is,

1. For hunting without a qualification per Table No. 1.	£8	6	8.
2. For entering another's lands without permiſſion, beſides forfeiting the dogs, &c. per Table No. 8.	1	13	4.
Carried over.	£10	0	0.

Brought

Brought over	£10	0	0.
3. For killing ſuch game during the prohibited ſeaſon, for each bird, *at least*, per No. 20.	1	0	0.
In all - -	£11	0	0.

Whereof one half goes to the informer, beſides other 20l. if the delinquent had not a Stamped Certificate.

However this may be in Scotland, in an Engliſh caſe proceeding upon two counts, one for 5l. for keeping an engine called a gun, to deſtroy the Game, not being qualified, and the other for 10l. for having killed two partridges; verdict was given for 5l. only: and with regard to the mode of conviction, Burns in his *Engliſh Juſtice of Peace*, ſays it has been frequently determined that it cannot proceed upon the ſingle oath of the informer. This prineiple is probably founded upon the intereſt which the informer has in the penalties, and we preſume, will apply equally to Scotland; the more eſpecially if informations be courted by the offer of a pecuniary reward payable upon the conviction of the offender: and if Gentlemen aſſociate to proſecute *at their joint expence*, the ſame objection might perhaps lie to the evidence of one of them in any action proceeding at the inſtance of the aſſociation.

This cloſes all we have to ſay about Hunting and Fowling, we ſhall next endeavour to inveſtigate the exiſting laws relative to Dove-Cots and Pigeons.

END OF THE FIRST PART.

T A B

OF OFFENCES AGAINST THE LAWS OF HU

APPLICABLE PEN

Offence.	Penal
1. Hunting or fowling without being poſſeſſed of a plough-gate of land - - -	Sterling. £ 8 6 8
2. Ditto, ditto, after the 1ſt of July in any year, without a ſtamped certificate for that year, - -	£20 0 0 and coſts
3. Any one in purſuit of Game refuſing to ſhew his certificate to another aſking it, and producing his own; or, ——— failing to tell his name and place of abode; or, ——— giving in a falſe name or place of abode -	£50 and do.
4. Forgers of the Stamped Certificates, or procuring them to be counterfeited; or, Who alter or ſell ſuch knowing them to be counterfeited -	Death as felons.
5. Witneſſes ſummoned in any complaint upon this Stamp Act, and refuſing to appear - -	£10 0 0 -
6. Whoever moleſts or proſecutes another for any thing he ſhall have done upon this Act, and ſhall be nonſuited -	Treble coſts,
N. B. The Stamped Certificate authoriſes ſuch only to kill Game as were before qualified.	
7. Whoever hunts or fowls in the corns of another from Eaſter till the ſame be cut down; or, ——— rides or goes through wheat any time of the year; or, ——— ranges in woods, parks, within dikes or brooms at any time, without permiſſion - - -	Damages - and 16s. 8d. for firſt ſecond, confiſcation
8. Common fowlers hunting *on any* grounds without *a ſubſcribed warrant* from the proprietor - -	£ 1 13 4 and forfeitu nets, after conviction.
9. Common fowlers found *any where* with guns *or nets* without a licenſe from a nobleman or heritor - -	To be ſent abroad as a
10. Any Judge competent who ſhall *delay* to enforce the penalty laſt mentioned - - -	£ 8 6 8 -
11. Any *Officer* in the army who ſhall kill Game, *pigeons, or any other ſort of fowls, poultry or fiſh*, upon any grounds with out a permiſſion *in writing* from the proprietor, -	£ 5 0 0 for each of
12. Any Soldier not an Officer committing the like offence, the Commanding Officer where ſuch Soldier is quartered, to pay	£ 1 0 0 for each of ment in two days to
13. Whoever takes hares or any winged game with girn or net	£ 8 6 8 for each offence whipping thro' the to
14. Whoever ſhoots hares - - -	£ 1 13 4 for each off
15. Whoever kills deer's kids under a year old -	£0 16 8 do.
16. Whoever kills deer or roes &c. in parks - -	£0 16 8 and indemn
17. Any child committing the like offence, their fathers or maſters liable - - -	£0 1 1½ each fault,
18. Whoever kills deers or hares in time of ſnow -	£8 6 8 each fault
19. Every perſon who ſhall wilfully take, kill, deſtroy, *carry, ſell, buy, have in his or her poſſeſſion or uſe*, any muir-fowl or tarmargan, betwixt the 10th December or 20th Auguſt; or, Any heath-fowl betwixt 10th December and 20th Auguſt; or, Any partridge betwixt 1ſt February and 14th September; or, Any pheaſant betwixt 1ſt February and 1ſt Oct. -	£5 0 0 for every bir in ten days, impriſonr for each 5l. of penalty
20. Every unqualified perſon who ſhall have in his or her cuſtody, or carry *at any time of the year, upon any pretence*, any hares, partridges, pheaſants, muir-fowl, tarmargans, heath-fowl, ſnipes or quails, without the leave or order of a qualified perſon - - -	£1 0 0 for the firſt other; or failing pay weeks impriſonment f months for every ſubſe
21. Every occupier of ground where muir-burn is made, or fire ſet to any heath or muir from the 11th April to 1ſt November; unleſs he can convict ſome other perſon -	£2 0 0 for firſt offen and 10l. for every ſub ment in ten days, fix w the firſt, two months
N. B. By a ſubſequent Act ſome of the above penalties are altered thus:	three months for every
22. Every perſon who ſhall wilfully take &c. or uſe, any heath-fowl commonly called Black Game, or any grouſe commonly called Red Game, betwixt 10th December and 20th Auguſt; or, Any buſtard betwixt 1ſt March and 1ſt September -	£20 0 0 at moſt and 1 fence; 30l. at moſt and other offence; failing impriſonment for firſt, every other offence.
23. Every perſon who ſhall knowingly and wilfully kill, take, or deſtroy; or, Uſe any gun, dog, net, ſnare *or other engine, with intent*, to take &c. any hare *in the night*, i. e. betwixt ſeven at night and ſix in the morning from 12th October to 12th February, or *in the day time upon a Sunday or Chriſtmas day; or*, Who ſhall kill any pheaſant, partridge, muir or heath Game in manner foreſaid; or betwixt nine at night and four in the morning from the 12th February to 12th October -	£20 0 0 at moſt, 10l. 30l. at moſt, 20l. at and 50l. for third offen of the 50l. impriſonme months; unleſs the fin public whipping.
24. Every perſon who takes eggs out of the neſts of partridges or wild ducks.	
25. Every perſon ſelling or expoſing to ſale any Game; and Every Poulterer, Saleſman, Fiſhmonger, Cook or Paſtry-Cook, having Game in his houſe or poſſeſſion -	£0 3 4 for each offe £5 0 0 for every h payment, houſe of
N. B. We doubt if this be applicable to Scotland.	months.
6. Whoſoever ſhall take a collar from a dog's neck with the maſter's name or ſtyle thereon; Who ſhall give away or ſell any dog not his own; Who finds a dog and does not cauſe him be booked in the Sheriff Clerk's books within forty-eight hours	£27 15 6¾ each offence. £ 8 6 8 do.

B L E

F HUNTING AND FOWLING, WITH THE PENALTIES.

Penalties.	Application.
for each offence.	Half to the king, half to the informer.
nd coſts of ſuit, do. -	To any perſon proſecuting.
o. do. -	Ditto.
ns. - -	
- -	To the Proſecutor.
- -	To the perſon ſo moleſted or proſecuted.
- -	To the Owner.
. for firſt offence, 1l. 13s. 4d. for nfiſcation of moveables for third.	To the King.
nd forfeiture of dogs, guns and conviction. -	One half of the fine at the diſpoſal of the Judge, the other and the dogs &c. to the diſcoverer.
broad as a recruit. -	
- -	To the Complainer before the Court of Seſſion.
for each offence. -	The fine to the poor of the pariſh where the offence was committed.
for each offence; or failing pay- vo days to forfeit his commiſſion.	do. do.
each offence, and failing payment, thro' the town where apprehended	One half to the King, the other to the ap- prehender.
for each offence -	One half to the diſcoverer the other at the diſ- poſal of the Judge.
do.	To the King.
and indemnification to the Party.	do.
each fault, - -	To the King.
ach fault - -	Half to the King half to the informer.
or every bird, or failing payment s, impriſonment for two months l. of penalty. -	One half of the fines to any perſon proſecut- ing; the other half to the poor or for re- pairing the high-roads of the pariſh, where the offence was committed.
for the firſt offence, 2l. for every failing payment in ten days, ſix priſonment for the firſt, and three r every ſubſequent offence.	do. do.
for firſt offence, 5l. for the ſecond, or every ſubſequent; failing pay- n days, ſix weeks impriſonment for two months for the ſecond, and ths for every other offence. -	do. do.
t moſt and 10l. at leaſt, for firſt of- l. at moſt and 20l. at leaſt, for every nce; failing payment, ſix weeks ent for firſt, and two months for r offence. -	One half of the fine to the informer, the other half to the poor of the pariſh.
at moſt, 10l. at leaſt, for the firſt ft, 20l. at leaſt, for the ſecond; or third offence; or failing payment l. impriſonment not beyond twelve unleſs the fine be ſooner paid, and ipping. - -	One half of the fines to the informer the other to the poor of the pariſh where the offence was committed.
for each offence. -	To the King.
for every hare or fowl; failing houſe of correction for three - -	One half of the fine to the informer the other half to the poor.
each offence. -	To the King.
do. - -	do.

PART II.

OF

DOVE COTS AND PIGEONS.

CHAPTER I.

Requiſite Qualification to have a Dove-Cot.——Deciſions on the point.——Proviſions for the preſervation of Pigeons.——Deciſions.

THE enumeration of the laws belonging to this title, we believe, will not detain us long. By chap. 74 of Parl. 1503, every lord and laird is ordained to erect Dove-Cots; but in the 1617, the number of Pigeons throughout the kingdom appears to have been reckoned a grievance, the 19th Act of that year enacting, that *no perſon ſhall have power or liberty to build a Dove-Cot* upon any lands within the realm, *neither within Burgh nor in the Country*, excepting he have lands and teinds pertaining to him, extending in yearly rent to ten chalders victual, next adjacent to the Dove-Cot; or at leaſt, lying within two miles thereof: and even in that caſe ſuch proprietor is prohibited from erecting more than one Dove-Cot within theſe bounds. At the ſame time however, it muſt be obſerved, that if 40 chalders of victual be produced within the ſpace of half a mile, inſtead of two miles, the proprietor of ſuch an eſtate may raiſe four Dove-Cots upon it: ſo it was decided by the Court of Seſſion in the year 1752.

ERSKINE informs us (B. 2 t.6. §7.) that the above ſtatute extends not to Dove-Cots then built; and if poſitive evidence be not brought that the Dove-Cot under challenge was built after the date of the ſtatute, the preſumption is that it was ſo before that period; and a deciſion of the year 1731, is quoted in ſupport of the doctrine, that the purchaſer of an eſtate with a Dove-Cot built upon it by one entitled to do ſo, has a right to take the benefit of it, though his purchaſe be not of ſufficient extent to give him the legal qualification, yet that he cannot rebuild it, if allowed to become ruinous: but this principle was controverted in 1797, when the Court ordered a Dove-Cot to be demoliſhed, becauſe the eſtate upon which it was built had been reduced by ſales below the regulation. It ſhould be attended to, that the ſtatute does not regulate the ſize of the Dove-Cots; whence we ſhould preſume that a perſon legally qualified, may raiſe as large a one as he pleaſes, while on the other hand, we beg leave to aſk, how far, ſtrictly ſpeaking, the prohibition againſt *building* Dove-Cots is applicable to the very general practice, eſpecially within burghs, of converting garrets into pigeon-houſes and of keeping theſe birds in wooden boxes affixed to walls.

The ſtatutes for the preſervation of Dove-Cots, are not numerous: that of 1503 c. 69, already taken notice of with regard to parked deer, declares the breaking of Dove-Cots to be a point of dittay, and the fathers or maſters of children guilty of the offence to be liable in 13s. 4d. Scots, *toties quoties*, for each of the children, or elſe to deliver them up to the Judge to be ſcourged according to the fault. The crimes of ſtealing pikes out of ſtanks, ſtealing or deſtroying hives and of breaking orchards or yards, are alſo enumerated in this Act, but as ſeveral later ſtatutes on theſe ſubjects, to be noticed under their reſpective titles, make no diſtinction of puniſhment of offenders,

offenders we doubt if this proviſion with regard to children, would now reſtrict Judges from inflicting a heavier fine than it enacts, upon their fathers or thoſe whom the law conſiders as reſponſible for them.

It is ſtatuted by chap. 84 of 1579, that the breakers of Dove-Cots, Cunningaries, i. e. Rabbet Warrens, ſhall pay to the proprietor *beſides damages*, 10l. for the firſt offence, 20l. for the ſecond, and 40l. (3l. 6s. 8d. ſterling) for the third tranſgreſſion; or, in caſe of inſolvency, ſhall ſuffer eight days impriſonment, and be fed on bread and water, for the firſt offence; fifteen days for the ſecond, and for the third fault, *hanging to the death*: the mode of conviction is by the party's "awin confeſſion or witneſſe." As to the puniſhment of death enacted by this and ſeveral other of the ſtatutes which we will have occaſion to notice, BANKTON ſays, B. 2. t. 3 § 167, Capital puniſhment, inſtead of fines, is never practiſed, for that were to inflict it for one's poverty, and not for his crimes; but, if one have not money to pay the fine, the common rule is, that he be chaſtiſed by whipping, impriſonment, or baniſhment, *qui non habet in ære, luat in pelle*, which cannot extend to capital puniſhment or demembration, ſo that ſuch proviſions are only *in terrorem*. The ſame author remarks, in another part, that there are no ſtatutes againſt ſhooting Doves found at large, but BOYD ſhews his Lordſhip is miſtaken in this reſpect, by quoting the Act 1567 c. 16, which ſubjects the ſhooters at doe, roe &c. *dow*, or fowl of river, with culvering, croſs-bow, or hand-bow, in the forfeiture of moveables, the one half whereof to be divided betwixt the Judge and the apprehender; or, if they have no goods, in 40 days impriſonment for the firſt offence, and the loſs of the right hand for the ſecond. An additional penalty is impoſed upon the Judge who ſhall fail to enforce this Act by 1581 c. 123, and this enactment is confirmed by that of 1587 c. 59, which declares that the ſlayers and ſhooters of harts, hinds,

hares, &c. and other wild beaſts, *without licence or allowance of the owners*, ſhall incur the pain and puniſhment due to the crime of theft. Boyd remarks, "the "*other beaſts* mentioned in theſe two Acts, which are "both expreſsly deſigned to enforce the Act 1567, "muſt be underſtood to comprehend doves, which "are enumerated among the other animals in that "Act: and by Parl. 1597 c. 266, the former Acts, "laws and conſtitutions againſt the ſhooting and flaying of deer, roes, hares, wild fowl *and doves*, and "taking them with girns and nets, are ratified and "confirmed."

To theſe Acts may be added the general ratification in the Act 1707 c. 13, of all the former laws for the preſervation of the Game, in ſome of which alone it appears that Pigeons are attended to, and likewiſe the proviſion in the Mutiny Act, in which this ſpecies of fowl is particularly mentioned.

With regard to practice continues Boyd, in that excellent work, his *Juſtice of Peace*, to which theſe pages are ſo much indebted, (vol. I. p. 269, Edinr. edit. of 1787,) the ſhooting of Pigeons is conſidered as an offence to be puniſhed. In a caſe which, not long ago, came before the Sheriff of Ayrſhire, about the ſhooting of Pigeons, the Sheriff found the perſon ſo ſhooting liable in damages to the party complaining; and the Lord Ordinary, before whom the cauſe was brought, affirmed the Sheriff's deciſion. The cauſe went no farther. Laird of Fairley *contra* Campbell of Newfield *.

Tenants

* Of this caſe, the following particulars have come to the Compiler's knowledge from good authority. Mr. Fairlie of Fairlie, with concurrence of the Procurator Fiſcal, proſecuted Mr. Campbell of Newfield upon the Act of 1597, for ſhooting at and killing pigeons from Mr. Fairlie's dove-cot, when they had alighted among Mr. Campbell's wheat, not diſtant above an Engliſh mile from the Pigeon houſe. Mr. Campbell's ſervants had his orders to kill the Pigeons when among the wheat, in the beginning

Tenants likewiſe are liable in damages for ſhooting Pigeons though treſpaſſing upon their farms.

ning of harveſt; but not to lift thoſe killed or uſe them: upon that idea he thought he was not liable to be proſecuted. It was proved that ſeveral pigeons had been killed among the wheat, that when ſhot at by Mr. Campbell's ſervants, they flew to Mr. Fairlie's Pigeon houſe, which was the neareſt by ſome miles; when ſhearing the wheat, ſeveral dead pigeons were found, and ſeveral of them died after they went home. The Sheriff found Mr. Campbell liable in ſome ſmall ſum to the Procurator Fiſcal, of penalty for killing the pigeons, and in full expences of proceſs, which were conſiderable: this decree was ſuſpended on caution, but the Lord Ordinary after ſeveral pleadings, affirmed it with coſts.

END OF THE SECOND PART.

PART III.

OF RIVERS, THE SEA-SHORES, AND FISHINGS.

CHAPTER I.

Of Rivers.——Public and Private.——Of Rivulets.——Scanty and Large.——Of Acceſſion.——Avulſion.——Iſlands riſing out of the water.——Of Lochs.——Of the Sea-Shores and the rights of the adjacent Heritors thereto.

IN enumerating the Laws under this head I ſhall attempt in the firſt place to ſhew what are the powers which the proprietors of the banks of rivers have over the rivers themſelves; and after having diſcuſſed that point, the laws regulating their rights over the fiſhes contained in the rivers ſhall next be detailed.

All rivers are divided into two general claſſes, viz. public and private. Every running water indeed, is included by Erſkine among thoſe *res communes*, which belong to no perſon, in which no individuals can acquire a property or deprive others of their uſe.

Public rivers however, the ſame lawyer informs us, are generally underſtood by writers, to be navigable rivers, *or thoſe on which floats may be carried to navigable rivers;* and ſo far from the conterminous heritors having any right over ſuch a river, it is conſidered as the dominant tenement with regard to the adjacent ground, and its banks alſo become public, in ſo far at leaſt

leaſt as they can be made at all ſubſervient to the purpoſes of navigation and the uſe of the river itſelf; no work whatever therefore, can be raiſed either upon the bed or the banks of a river ſo as to impede its navigation; but in every other reſpect the property of the banks belongs to the owners of the conterminous grounds as an acceſſory. If a river deſerting its firſt channel, ſhall form to itſelf a new one, the new channel, becauſe it muſt neceſſarily follow the condition of the river, becomes public, and the old one, which for the ſame reaſon ceaſeth to be public, becomes the property of thoſe to whom the adjacent grounds on each ſide belong, Erſk. 2. 1. 5. This principle ſeems to be applicable to public rivers only, it was decided in the year 1735, with regard to a river which had overflowed it's banks and wrought out a new channel, that the owner on that ſide on which the encroachment is made, may either force it back to its former channel, provided he do ſo without any undue delay, or let it remain as it is.

If the river be allowed to continue in the new channel which it has wrought out to itſelf, the common rules of acceſſion will not be thereby altered, and it has even been doubted whether the heritor whoſe lands are encroached upon be entitled to any part of the deſerted channel for his indemnification.

Smaller rivulets or brooks are, according to the general opinion, *privati juris*, (i. e. private property,) and conſequently the landholder, within whoſe grounds they run, may divert their courſe, unleſs he be reſtrained by a ſervitude or other poſitive right in favour of the inferior tenement, Erſk. 2. 6. 17. and ſurely to theſe powers may be added that of preventing ſtrangers from paſſing over their lands to and from the ſtream.

This laſt diviſion has been ſubdivided, by Lord Kaimes we believe, into ſcanty and large ſtreams; but no rule is laid down by which the line of diſcrimination

tion can be drawn betwixt theſe claſſes. The former it is ſaid, may be applied to any uſe by the proprietor of the lands through which it runs; and ſo may the latter alſo, in any manner whatever, without the ſmalleſt regard being paid to the intereſt of the inferior proprietors, provided only there be no waſte made of the water. Many queſtions have occurred in our ſupreme Court, about the uſe and application of running water, and upon attending to the import of the following deciſions, it is left to be conſidered, whether the doctrine juſt quoted from Erſkine, is to be regarded as a general rule on the ſubject; or the following, that every heritor on the banks of a river or large ſtream from its ſource to its mouth, after taking *his own free uſe without waſte*, of the water, muſt allow it to follow its natural courſe.

In 1741 an heritor was found not entitled to place any machinery to obſtruct, or make any new channel to alter, the courſe of the water, but fruitleſs attempts were made in 1749 and in 1761, to prevent the upper heritors from enlarging and improving the machinery of works upon rivers, although a greater quantity of the water was thereby exhauſted. In 1768 a proprietor was prohibited from turning aſide the current of a ſtream to water meadows, ſo as not to allow the water to return to its former channel, yet by a former deciſion in the year 1761, a uſe of a ſimilar tendency was confirmed to the enjoyer, becauſe it had been acquieſced in for forty years together by the inferior heritors, and in the year 1790, another extraordinary privilege was eſtabliſhed upon a ſimilar title. An attempt to alter the channel was checked in 1791, and in another caſe a proprietor who had a conduit from a rivulet for his family uſe, was obliged to reconvey all the ſuperfluous water to its former channel. In 1792, it was decided though not without a conſiderable diviſion on the bench, that when the oppoſite banks belong to different heritors, the one is not entitled even to draw a

canal

canal from the river which returns to the former channel lower down, without the conſent of the oppoſite heritor. Far leſs would the one be permitted to carry a dam-dyke acroſs the ſtream againſt the inclination of the other: and the party aggrieved may object to the improper freedoms of his neighbour although he feel no immediate inconveniency ariſing from them. Neither can the lower heritor on the ſtream make ſuch operations as to cauſe the water regorge on the ſuperior, although no preſent damage enſue: ſo it was decided by the Court in the years 1744, and 1790.

The following paſſages from ERSKINE apply to all rivers indiſcriminately. When a river threatens an alteration of its channel, by which damage may ariſe to the proprietor of the adjacent or oppoſite ground, it is lawful for him to build a bulwark, *ripæ muniendæ cauſa*, to prevent the loſs of the ground threatened by that incroachment: but this bulwark muſt be ſo executed as to prejudice neither the navigation nor the grounds on the oppoſite ſide of the river. The inſenſible addition which grounds lying on the banks of a river receive by what the water waſhes gradually from other grounds, accrues by a natural acceſſion to the owner of the land which receives the addition. But if a part of one man's ground ſhall, by a ſudden inundation or torrent, be carried off and joined to lands belonging to a different proprietor, the property of that ſeparated part continues, notwithſtanding its being joined to another perſon's field, to be the property of the former owner, Erſk. 2. 1. 5. & 14.

In the event of an iſland riſing out of the water, it belongs to the King, if in the ſea or a public river; and if in a private river, it is divided betwixt the proprietors of the adjoining banks by a line drawn down the middle of the ſtream.

This cloſes all we had to ſay of rivers themſelves, a few obſervations remain to be made reſpecting LOCHS. Such as are entirely ſurrounded by the lands

of one perſon, belong excluſively to that heritor, in ſo far as his neighbours have not ſervitudes upon them; thoſe locks again from which permanent ſtreams flow cannot be drained by the adjoining proprietor; but ſuch from which ſtreams flow at certain ſeaſons only, may be ſo, with the ſpecial conſent of the heritors of the inferior tenements to allow the water to paſs through their grounds; the drain for which purpoſe muſt be made and maintained entirely at the expence of the drainer.

By our practice, proprietors adjoining to the ſea-ſhores, may encroach upon the ſea and fence it off as far as they are able, provided they interfere not with the common intereſt in the exerciſe of commerce and navigation; and there is this other material difference betwixt the rights of an heritor on the banks of a public river, and of one on the ſea-ſhore, that the latter, without the enumeration in his grant of "wreck and "ware, ſea and ſhore," &c., has no title whatever to the ſhore within the high-water mark, or to any of its productions, as ſhall be afterwards noticed. Yet as the adjacent heritors cannot incroach on the rights of the community over the ſea-ſhores for the purpoſes above mentioned, neither is the King on the other hand, nor his donatory, entitled to encroach upon the privileges of the heritors. This principle is illuſtrated by a deciſion of the Court in 1793, ſetting aſide a feu of a part of Leith Sands granted by the magiſtrates of Edinburgh, as the King's donatories, in ſo far as it circumſcribed the paths made by the neighbouring proprietors to and from their poſſeſſions in that quarter.

Doubts have been entertained, ſays ERSKINE, whether *ſea-greens* (i. e. grounds in ſome meaſure gained from the ſea, but which ſtill continue to be overflowed in ſpring-tides,) ought to be reckoned *inter regalia*, and he gives it as his opinion, that they ſhould not; becauſe by the cuſtom of Scotland, the ſea-ſhore is

reſtricted

reſtricted to the ſand over which the water flows *in common tides*, and by our conſtant practice, proprietors who border on the ſea, incloſe, as their own property, grounds far within the ſea mark. B. 2. 2. 17.

CHAPTER II.

Of Fiſhings in general.——Of Salmon Fiſhings in Rivers.——What confers this right.——By Rod or Spear.——By Net and Coble.——by Cruives, &c.——Statutory Regulations againſt killing Salmon in forbidden time.——Of the Rights of the Owners of the Fiſhings to prohibit others.——to ſeize the Rods of treſpaſſers, &c.

WE ſhall now endeavour to arrange the laws reſpecting the rights which proprietors of the banks of rivers have over the fiſh contained in them. STAIR ſays that the right of fiſhing for white fiſh, as cod, *trout*, perch, &c., either at ſea or in rivers or lakes, is common to all, without the neceſſity of any grant from the King; and BANKTON allows the right of fiſhing to be common, excepting that of ſalmon, without any grant from the Crown, provided it be exerciſed agreeably to law, B. 2. 3. 3. ERSKINE however (B. 2. 6. 6.) ſays, that this opinion of Stair may be called in queſtion. BOYD, in his *Juſtice of Peace*, compares theſe opinions and gives his reaſons for conceiving ERSKINE to be in the wrong, and that he has not been able to contravert the opinion of Stair that the right of fiſhing is public except in ſome particular inſtances, vol. I. t. 11. p. 340. However this point may ſtand, certain it is that the proprietors adjacent to rivers have no excluſive right to the fiſhings on them without a ſpecial grant; nor are they entitled

to prevent any one from *angling* on them excepting in ſo far as he treſpaſſes on their property to get to the ſtream. This is ſpeaking of fiſhing in general, the right of fiſhing for ſalmon, falls under particular regulations.

Under the reign of the ſame Alexander, in whoſe time the right of hunting and fowling was common, excepting in foreſts and warrens; all the Leiges were likewiſe at liberty to kill ſalmon, excepting in waters running directly to the ſea; but now, even the heritors of the adjacent banks themſelves, are not allowed to kill that fiſh, excepting perhaps with rod and ſpear, and oppoſite to their own lands; and if they can do ſo at all, without a ſpecial grant of ſalmon fiſhing from the Crown, it muſt be for their own amuſement only, or the uſe of their families. This right is not veſted in the King ſo much on account of ſalmon being a royal fiſh, as owing to the value of the property; ſalmon fiſhings with net and coble, cruives and currochs, being often attended with as great pecuniary advantages as the property of the land itſelf, are therefore conſidered as too high an intereſt to be carried by implication in Charters from the Crown. The expreſſion generally made uſe of to convey this right by net and coble, is, *cum piſcationibus ſalmonum*, which carries effectually to the donee an excluſive intereſt in the fiſhery upon the part of the river deſcribed in the grant; and if the donatory is not thereby expreſsly reſtricted to drawing aſhore his nets on one ſide in particular, he is preſumed to be allowed the uſe of both ſides for that purpoſe, even though proprietor of neither; but it was determined in the 1623 that the oppoſite proprietors having each a right of ſalmon fiſhing are entitled to draw their nets on their own reſpective ſides only of the river. Though the above be the clauſe uſually made uſe of for this conveyance, yet, ſays ERSKINE, (B. 2. 6. 15.) the general clauſe *cum piscationibus*, is a ſufficient title, for conſtituting a right

right to ſalmon fiſhing, when confirmed by an uninterrupted poſſeſſion of it for forty years; and according to STAIR, (B. 2. t. 3. § 69.) this holds not only in freſh water, but alſo in the ſea at the river's mouth, where the ſalmon are frequently taken, and likewiſe to the taking of every other ſort of fiſh. ERSKINE continues, as this right in conſequence of its being *inter regalia*, remains with the ſovereign after he is diveſted of the property of the lands on both ſides of the river, the Crown may make a grant of the ſalmon fiſhing in a river or any part thereof in favour of one who has no lands on either ſide. The whole eſtate of ſuch grantee conſiſts in the fiſhing, and this right entitles him to draw his nets on the banks, without the proprietor's conſent, as a pertinent of the fiſhing. The proprietor of the fiſhing is alſo entitled to fix pails and trees adjacent to the river where the water ebbs and flows, to mend and dry his nets, and the adjacent heritors muſt leave a ſufficient ſpace clear on the banks for theſe purpoſes: ſo it was decided in 1612, and again in 1623.

It muſt be obſerved however, that ſuch grants are always without prejudice to the power of the adjacent heritors to fiſh for their amuſement and their own family uſe, immediately oppoſite to their properties: it was accordingly decided in 1787, that the purſuers, who were the contiguous heritors, have a right to fiſh *trouts* oppoſite to their reſpective properties with trout-rods or hand-nets, but not with net and coble, *or in any other way that may be prejudicial to the ſalmon fiſhing belonging to the defender*. This deciſion ſeems to confirm nothing more to the purſuers than the right which STAIR affirms, in the paſſage quoted at the beginning of the chapter, to be common to all; and even that may be loſt for ever, according to opinions delivered from the bench in the above caſe, by a dereliction of the right for forty years, accompanied with uninterrupted poſſeſſion during the whole of that

that period by the King's donatory of the fiſhings. Hence it would appear to be conſiſtent with our practice, that a right to challenge *trout fiſhing* may be acquired by the poſitive preſcription *.

Hitherto we have been treating of ſalmon fiſhings by rod and ſpear, or net and coble only; the more profitable modes of doing ſo by cruives, &c. are conſidered as rights of a higher nature ſtill, and not to be carried by any general clauſe. If however, this right have been once veſted in a ſubject, it may be tranſmitted from him by a general clauſe, ſuch being preſumed to comprehend all the privileges of that nature poſſeſſed by the cedent himſelf: ſo it was decided in January 1776, *Town of Inverneſs*. It was farther decided by the Court in two caſes determined in July 1778, that cruive fiſhings are not incompatible with others, but that the different modes of fiſhing may be the ſubject of ſeparate grants, not only in the ſame river, but in the very ſame parts of it. So great indeed is the royal prerogative in this reſpect, that a cruive fiſhing may be conſtituted by grant near the mouth of a river, though ruinous in the extreme to the rights of fiſhing with net and coble farther up the ſtream.

Having now inveſtigated the point of qualification as it may be called, to kill ſalmon, the detail of the ſtatutes on the ſubject is the next object to be attended to. Many of theſe relating entirely to the curing and packing of the fiſh, come not under the compaſs of this work, but thoſe who wiſh to have a more complete detail, will find it in Boyd's *Juſtice of Peace*, t. 11., and likewiſe find the point inveſtigated, how far by our law, the right of fiſhing remains public.

* Yet if trout fiſhing be a public right, how is this doctrine compatible with the eſtabliſhed principle that no public right can be acquired by any one excluſively, by interrupting particular perſons from the uſe of it for the longeſt courſe of time?

lic: all that we conceive to fall to our province at preſent, is to arrange the different proviſions regulating the time and manner of taking the fiſh, and to ſecure the rights of the proprietor.

The forbidden time to kill ſalmon is from the feaſt of the aſſumption of our Lady (i. e. Auguſt 15th,) to the feaſt of St. Andrew, (30th November,) under the pains applicable to the ſlayers of red fiſh enacted by 1424 c. 35.

Whoever is convicted of the ſlaughter of red fiſh *in forbidden time*, whether the doer *or he who bids it be done*, to pay 10l. (16s. 8d. ſterling,) for his unlaw, without remiſſion and for the third offence *to buy his life* *, 1457. c. 86. Penalty of 10l. upon thoſe who ſet creels *or any other engines*, in ſmolting time and the Sheriff appointed to deſtroy the engines, 1457 86, 1469. 37.

The unlaw for killing ſalmon *in forbidden time*, or for ſlaying ſmoltes in mill-dams by nets, thornes and cruives, made 10l. (16s. 8d.) for the firſt time, 20l. for the ſecond, beſides 30s. (2s. 6d. ſterling,) to the baillie of the royalty, or regality, for each offence proved before him, and tinſel of life, for the third offence; and all privileges to kill ſuch fiſh in forbidden time as aforeſaid, to ceaſe, until conſidered by the King and Lords whether they be conſiſtent with the common weal, 1503. 72. The Acts made againſt ſlaying red fiſh, ſmolts, and fry of all fiſhes *in forbidden*

* For the life of ane man, nine times twentie kye.—For ane fute, ane marke.—For ane tuth, twelve pennies.—For ane wounde of the length of ane inche, twelve pennies.—For ane wounde under the claithes, twelve pennies.—For ane ſtrake with the ſteiked neif, twelve pennies.—For ane ſtrake with the palme of the hand, for ilk finger twelve pennies.—For ane ſtrake with the fute, fortie pennies.—For the blude ſhed out of the head of ane Earle, nine kye, &c. &c. *Reg. Maj.* B. 4. c. 36. to the end. Theſe are ſaid to be the laws of Kenneth III. who began to reign A. D. 1004.

bidden time, ratified, with this addition, that all Lords and freeholders whatever having lands next adjacent to the rivers and waters, where ſalmon are taken, ordained to find caution in the books of council, that they ſhall be anſwerable for their tenants and indwellers within their lands, *and for all others within their bounds*, ſo far as their lands extend, *whom they may ſtop or let*, that they ſhall not ſlay ſalmon *in forbidden time*, with coble, net, wand &c. *or any other engine;* an Earl or Lord under the pain of 1000 merks; (55l. 11s. 1⅓d. ſterling,) a Baron and others whatſoever, owners of waters and lands, under the pain of 500 marks: one half of the penalties to be uplifted by his Majeſty, the other half to the Judges contained in the former Acts *, all of which are thereby ratified—1597, 261.: we donot know that this Act was ever attended to.

The ſlaying of ſalmon *in forbidden time*, or of kipper, ſmoltes "or ſik black fiſhe," *at any time*, to be held as the crime of theft *to the committer whatsoever*, and puniſhed as ſuch in every quality, *according to the committer's rank and eſtate*, by 1600 c. 11.

The exception in former Acts of the rivers Annan and Tweed taken away after the Union of the two Crowns by 1606, 5. The Act itſelf informs us of the reaſon of this exception, viz. that theſe two rivers being in ſeveral places the boundaries betwixt Scotland and England, "the forbearance on the Scots part of "the ſlauchter of ſalmons, *in forbidden time*, and of "kipper, ſmolts and black fiſhe, *at all times*, would "not have made ſalmon any mair to abound in theſe "waters, if the like order had not been then ob-"ſerved upon the Engliſh ſide. Whilk impediment "through the infinite mercy of God, being now, re-"moved &c."

Finding that the laying of lint in lochs and burns, is not

* For theſe, ſee the Acts 1503. 72. & 1535. c. 16.

not only hurtful to all fiſhes breed within the ſame, and beſtial that drink thereof; but alſo the haill waters of the ſaid lochs and burns, thereby being infected *are made altogether unprofitable for the uſe of man, and very noyſome to all the people dwelling thereabout*, therefore ſtatuted, that no perſon, in time coming, lay in lochs and running burns, any green lint, under the pain of 40s. (3s. 4d. ſterling,) *toties quoties*, and confiſcation of the lint; to be applied to the poor of the pariſh within which the lochs and burns lie; and the Kirk Seſſion impowered to execute the Act, uplift the unlaws, and diſpone upon the lint to the weal of the poor of the pariſh, by 1606, c. 13. This Act with many others for the preſervation of the Game, is revived and ratified by the Act 1685, c. 20.

Among other renewed regulations is the following, that millers who ſlay ſmolts or trouts with creels, or any other engine, or any who dams or laves, ſhall be puniſhable as ſlayers of red fiſh; and where the tranſgreſſors have no means, they are to be put in priſon, irons, or the ſtocks, for the ſpace of one month, upon their own expences; and if they have it not of their own, to be fed on bread and water.

All the Acts made anent the killing of ſalmon, kipper, and black fiſh, *in forbidden times*, and the killing and deſtroying of the fry and ſmolts of ſalmon, are ratified; and if the contraveners be not able to pay the fines, that they be puniſhed corporally or by baniſhment, at the diſcretion of the Judge; *or if the delinquent be found fit to ſerve in the recruits*, that he be delivered to any of the Officers of his Majeſty's forces, for the uſe of his Majeſty's ſervice; and farther that the half of the fines contained in all the former Acts, be given to the diſcoverer, ordained by 1696, c. 33. All the Acts made anent the ſlaying of red fiſh, ſmolts and fry, again ratified and approved of, and the Judges therein mentioned, required to put them in due execution, and to exact the fines without abatement,

or puniſh the delinquents perſonally if inſolvent: *certifying ſuch Judges as ſhall fail* to hold Courts at Paſch and Michaelmas yearly, and uplift the fines or puniſh the delinquents, after their having been required perſonally to do ſo, under form of inſtrument, by any perſon concerned, they ſhall be liable in the ſum of 500 merks, (27l. 15s. 6⅔ ſterling,) to belong to the perſon who ſhall purſue the Judge ſo failing, the proceſſes to be raiſed before the Lords of Seſſion for that effect, are appointed to be ſummarily diſcuſſed, and the Lords are empowered to modify the expences of plea, beſides the penalty; and farther, the Officers of his Majeſty's forces are required to apprehend the perſons of the delinquents found guilty or declared fugitive, for their ſerving as recruits, upon obtaining a warrant from the Judge Ordinary for their apprehenſion, 1705. 2. This Act alſo ſtrictly prohibits and diſcharges the fiſhing of ſalmon from Saturday at midnight to the ſame time of Sunday.

It has been ſeen what the writers on our law conſider to be legal qualification to entitle one to kill ſalmon, yet it appears worthy of remark, that not one of the ſtatutes excepting that about millers, in which by the by, ſalmon are not mentioned, make any diſtinction whatever of perſons, and while they do not reſtrict this fiſhing to any particular claſs from the 30th November to the 15th Auguſt, they prohibit all indiſcriminately and at every ſeaſon, from killing kipper ſmoltes and black fiſh. Is it then to be inferred from this, that the right of killing ſalmon is not reſtricted at all, but during a particular ſeaſon of the year? However this may be, upon what grounds are the owners of the fiſhings entitled to bar others from fiſhing at all times, when the King, from whom they themſelves derive their right, and in whoſe place they come, has neither prohibited any one from killing ſalmon during the greater part of the year, nor given the proprietors any expreſs power to do ſo at all? If the

right

right of killing ſalmon belong excluſively to the King, and conſequently to his donatories, why has not the Legiſlature ſecured the right by levelling penalties againſt ſuch as ſhould encroach upon it, in the ſame manner as it has protected the Game on ſhore? As this has not been done, allowing the right of the King's donatories to be excluſive, how are they to proceed againſt thoſe who invade it? An action of theft againſt the tranſgreſſor, we humbly conceive to be incompetent, becauſe one can hardly be ſaid to be robbed of what he never poſſeſſed; and moreover, ERSKINE expreſsly lays it down, that the ſalmon when once caught, become the abſolute property of the catcher. B. 2. 1. 10. The Act of 1600 indeed, appoints the ſlayers of ſalmon to be puniſhed as thieves, but it makes no diſtinction of perſons, and at any rate applies to the prohibited ſeaſon only.

There appear difficulties here which we acknowledge our inability to ſolve, and beg leave to refer to the conſideration of thoſe of more knowledge and experience; yet whatever other action may be competent to the proprietors of fiſhings againſt ſuch as incroach upon their right, there ſurely lies a common action of treſpaſs againſt the invader, at the inſtance of the adjoining heritor, for croſſing over his lands to get to the ſtream; yet even this, will not apply to one fiſhing from a public bridge or highway. With regard to the Act 1597, ordaining heritors to find caution for their tenants, although this enactment be not enforced, does it not ſerve to ſhew that the law conſiders the heritors as liable to the owners of the fiſhings for the treſpaſſes of all upon their lands; and moreover as their cautionary obligation extends to the prohibited ſeaſon only, may it not be thence inferred, that the tenants may fiſh in the other ſeaſons with impunity? In whatever manner the community at large may be debarred from the enjoyment of this privilege; it will be recollected that the proviſions of the Mutiny

Act ſufficiently protect ſalmon as well as every other fiſh, from military violence. It ſhould likewiſe be particularly attended to, that neither the fiſhing rods of common fiſhers, nor the fiſh they may have caught, are among the ſtatutory penalties; the ſeizure of either therefore, by the owner of the fiſhing or the heritor muſt be unwarrantable.

CHAPTER III.

Statutes and Deciſions reſpecting Cruive and Still Fiſhings.——Of Salmon Fiſhings in Mill-dams, &c.——Statutes regarding Mill-dams.——Of Salmon Fiſhings in the Sea and mouths of Rivers.——Of Oyſter and Muscle Beds, and other Marine Productions.——Of White Fiſhings——Of Royal Fiſhes.——Of Lobſter Fiſhings.——Table of Offences under this head, and the applicable Penalties.

A FEW ſtatutes regulating ſalmon fiſhings by cruives &c., and in particular parts of a river, ſtill remain to be taken notice of. By 1424 c. 11. 1477 c. 73, 1563 c. 68, and 1685, c. 20, it is ordained that cruives ſet in water, where the ſea ebbs and flows be put away and deſtroyed for ever, notwithſtanding any privilege to the contrary, and all cruives and yares ſet of late, upon ſands and ſhaulds far within the water where they were not before, to be deſtroyed and put away, excepting thoſe upon the water of Solway. This regulation was not obeyed, but ERSKINE ſays, (B. 2. 6. 15,) that fiſhing by cruives or zairs, where the ſea ebbs and flows, is abſolutely prohibited, and by the firſt and laſt of the above ſtatutes, thoſe ſet on freſh water and without expreſs infeftment of ſalmon fiſhing, are ordained to be deſtroyed and put away for

for ever, and that where allowed by infeftment, that each heck of the cruives be three inches wide, that none be allowed to ſtand in forbidden time, and that *the Saturday's ſlope* be obſerved. One of theſe Acts farther requires, that the mid ſtream be left free for the ſpace of ſix feet; and by 1489, c. 15, it was reduced to five feet. Tranſgreſſions are declared to be a point of dittay, and the penalty 5l. (8s. 4d. ſterling,) for each irregular cruive.

The Saturday's ſlope here mentioned alludes to the requiſite of chap. 16, of Alexander II's *. ſtatutes, entitled, "The law of waters," that the water ſhould be free ſo that no man ſhould take fiſh in it, from Saturday after *the evening Song*, until Monday after ſun riſing: the evening ſong in this reſpect was determined to be 6 o'clock, in two queſtions decided by the Court of Seſſion in the year 1665, betwixt *the town of Aberdeen* and *the heritors of Don Fiſhings*, and it was decided in 1765, that the neceſſity of the Saturday's ſlope cannot preſcribe, nor the laws for the improvement of ſalmon fiſhing be abrogated *non utendo*. The manner of making the ſlope, ERSKINE informs us, is by pulling up the hecks of all the cruives the height of an ell.

Another requiſite of Alexander's laws was declared obſolete in one of the above caſes from Aberdeen, upon a proof being led of the practice. This curious ordinance is, that the mid ſtream of the water be ſo free in all parts, *that a ſwine of the age of three years, well fed, may turn himſelf within the ſtream round about, ſo that his ſnout nor tail ſhall not touch the bank of the water.* A meaſure apparently ſo whimſical, it has been remarked, is now changed to five feet.

The ſtatuted diſtance of three inches betwixt the hecks

* He began his reign A. D. 1214.

hecks of the cruives, was confirmed at the ſame time, and again determined in 1704, in a queſtion betwixt the *Laird of Finhaven* and *the town of Brechin*, when it was alſo ſettled, that ſheeting the cruives, (*i. e.* putting a ſheet daubed with pitch along them,) is an unwarrantable practice.

It was farther eſtabliſhed in one of the Aberdeen caſes, that the ſituation of the cruives might be altered within the bounds of the fiſhing, provided the former cruive dike be deſtroyed, ſo that the fiſhings above might be in no worſe ſituation than before; and in the caſe of *Falconer of Newton, verſus Scott of Commieſton*, 1701, every cruive dike was ordained to be three ells broad, and a foot and a half high above the water, as the ſtream runs at ordinary times, from the middle of April to the beginning of May: yet in 1750, the Court found that the ſuperior heritors could not remove or procure a Saturday's ſlop in a high dam dike which had been immemorially uſed by an inferior heritor, although the upper fiſhings were thereby materially injured *. In 1762, all cruives were ordained to be perpendicular. In 1769, the owner of a cruive fiſhing was prohibited from making any material alteration in their conſtruction, to the prejudice of the upper fiſhings, or with a view to the improvement of a ſeparate coble fiſhing of his own: and with regard to removing the cruives in forbidden time, it was decided in 1783, that it is not neceſſary to remove *the ſole trees*, or *ſide posts* of the cruive boxes, but that the removal of *the hecks* and *inſcales*, is ſufficient to anſwer the purpoſes of the law. Declared to be a point of dittay to have illegal cruives, or any ſtanding in forbidden time in freſh water, under the penalty of 5l. (8s. 4d. ſterling,) for every irregular cruive exigible in the Juſtice Air, (i. e. the Circuit Court,) 1489 c. 15.

* How is this compatible with the principle eſtabliſhed in 1765, that the right to a Saturday's ſlop cannot preſcribe *ob non utendo*.

15. This Act is ordered to be enforced in all points, with this addition, that the receipts and aſſiſters of the tranſgreſſors, be puniſhed in the ſame manner as the principals, by 1535. 16.

Salmon fiſhing and other fiſhing whatſoever prohibited in the river of Forth above the Pow of Alloa, on both ſides of the ſaid river, with pock-nets, herry-water-nets, or any other engines *not expreſsly allowed* by law, and to the prejudice of the heritors' right of ſalmon fiſhing in the ſaid river; and warrant granted to the Sheriff principal of the Shire of Stirling, Baillie of the water of Forth, and his Deputes, to ſuppreſs the ſaid unlawful manner of fiſhing, and to puniſh the tranſgreſſors by fining, not exceeding 20l. (1l. 13s. 4d. ſterling,) *toties quoties*, or impriſonment as they ſhall ſee cauſe, 1698, c. 3. This local ſtatute ſeems to be the only one in which the heritors rights are noticed, and it came to be diſputed whether the prohibition applied to interlopers only, or to the heritors themſelves likewiſe. The Lords found the Act to be general, and the Houſe of Peers affirmed the deciſion in 1763 *.

In the 1793, a *Still fiſhing*, (i. e. by nets, faſtened to poles, and ſtretched quite accroſs the water,) erected by an heritor on the water of Leven, was removed, in reſpect that upon inveſtigation, the right appeared to be founded upon uſe and wont only.

Rights to FISHINGS ON BRAES, DAM-HEADS, OR DYKES, are always unfavourably received in law: yet ſuch a right was ſuſtained in the year 1750, the grant appearing to have been made in ſome of the old titles.

DAM-DYKES themſelves, have been likewiſe the ſubject of ſtatutory regulations. By 1696, c. 33, *in reſpect*

* So far from this prohibition not applying to the heritors, we ſhould ſuppoſe that with regard to ſalmon at leaſt, it can apply to them alone, if the right of killing that fiſh in any manner, be confined to the King and his donatories.

reſpect ſalmon fiſhing is much prejudiced by the height of mill-dams, a conſtant ſlope is appointed in the middle ſtream of each mill dam-dyke; and if the dyke be ſettled in ſeveral grains of a river, that there be a ſlope in each grain, except in rivers where cruives are ſettled, and *that the ſlope be as big as conveniently can be allowed, ſo as not to prejudice the going of the mill:* and laſtly, fiſhing at ſuch dam-dykes diſcharged, under the pains applicable to thoſe who kill black-fiſh, and deſtroy ſalmon fry: for which ſee Act 1503. c. 72.

The right to SALMON FISHING IN THE SEA, may be always made the ſubject of a particular grant: it was formerly obſerved that the general clauſe *cum piſcationibus*, corroborated by preſcription, will confer that right, and although the general rule is, that without an enumeration in the grant, of "wreck and ware, "ſea and ſhore," &c. the adjacent heritor has no title whatever to the ſhore within the flood water-mark, or to any of its productions, ſuch as oyſter and muſcle beds, kelp, &c.; yet the uninterrupted enjoyment of the uſe of any of theſe articles for a courſe of forty years, will eſtabliſh a right to as much of them as the heritor may require for his own family uſe: it was ſo decided with regard to the uſe of a muſcle bed, in 1764.

Lime ſtone, coals and all other minerals under the ſea, and indeed all marine productions whatever, are ſo abſolutely at the royal diſpoſal, that they may be made over to one who has no concern in the contiguous land; yet, as ſuch a right is in general moſt advantageous to the adjacent heritor, the grant is uſually conferred upon him, and this practice has probably given riſe to the prevalent opinion, that he has a preferable title to it.

It appears to be the opinion of STAIR, p. 245 § 60. that a grant from the Crown to WHITE FISHING may be rendered excluſive, by an uninterrupted poſſeſſion during a courſe of preſcription; but it is conceived

conceived that ſuch a right is incompatible with that part of the ſtatute 1705 c. 2. which authoriſes all the Leiges to take, buy, and cure, herring and white fiſh, in all and ſundry ſeas, channels, bays, friths, lochs, rivers, &c. of this kingdom and iſlands thereto belonging, *whereever they are or may be taken;* at leaſt, what occaſion would there have been for this declaratory enactment, had the right of white fiſhing been common, as maintained by BANKTON, STAIR, and BOYD?

In every grant of fiſhings from the Crown, there is always an implied exception of ROYAL FISHES, which belong neither to the killer by occupancy, nor to the owner of the ground whereon they are caſt, but to the King *jure coronæ.* By the *Leges Forestarum*, all great whales belong to the King, and alſo ſuch ſmaller ones as cannot be drawn from the water to the neareſt part of the land, on a wain with ſix oxen. But no whales have, for at leaſt a century paſt, been claimed by the King, or by the Admiral his donatory, excepting ſuch of a ſize conſiderably larger than thoſe above deſcribed, ERSK. B. 2. 1. 10.

The only other regulation we think neceſſary to take notice of here, is that of the Act 9th Geo. II. c. 33. § 4. which enacts, that *no perſon* ſhall kill or deſtroy any LOBSTERS on the coaſt of Scotland, from the 1ſt June to the 1ſt September yearly, under the penalty of 5l. ſterling, for each offence, to be recovered by any perſon who ſhall inform and ſue for the ſame, on a ſummary complaint before two Juſtices of Peace of the ſhire in which the offence ſhall have been committed. It is preſumed that during the reſt of the year, the right is common.

Though Juſtices of Peace be not mentioned in any of the Acts excepting the laſt, they are ſpecially authoriſed by 1617 c. 8. to take cogniſance of every

offence under this title, "in the trial whereof they "shall proceed by witneſſes, by oath of partie, and "*the puniſhment to be inflicted by them, ſhall be a pecu-* "*nial ſumme, answerable to the circumſtance of the* "*offenſe, and the qualitie of the offender.*"

END OF PART THIRD.

PART

TABLE

Of OFFENCES AGAINST THE LAWS OF FISHINGS, AND THE APPLICABLE PENALTIES.

Offence.	Penalties.	Application.
1. Whoever kills ſalmon or red fiſh or bids it be done, from 15th Auguſt to the 30th November. Act 1424. 35. N. B. This crime is made theft by a ſubſequent Act, and puniſhable according to the committer's rank and eſtate, as is alſo that of killing kipper, ſmolt, or ſuch black fiſh *at any time*; but by a ſtill later enactment, if the offender be inſolvent, he is ordained to be puniſhed corporally or by baniſhment at the diſcretion of the judge, or *to be ſent to the army*, if fit for the ſervice. 1600. 11.—1696. 33.	Sterling. £ 0 16 8 for the two firſt offences, to buy his life for the third. - -	One half to the King, the other half to the informer.
2. Whoſoever ſets creels or other engines *in ſmolting time*. 1469. 37.	£ 0 16 8 for each offence. -	do. do.
3. Whoſoever ſlays ſmolts in mill-dams by nets, thornes or cruives. - - 1503. 72.	£ 0 16 8 for the firſt fault, 1l. 13s. 4d. for the ſecond: death for the third -	do. do.
4. Who fiſhes in mill-dams. - 1696. 33.	do. do. -	do. do.
5. Every Earl or Lord whoſe lands are adjoining to ſalmon fiſhings, to prevent his tenants &c. from killing ſalmon *in forbidden time*. - - Every other heritor in the like ſituation, - 1597. 261. *Que.* Was this Act ever attended to?	£55 11 1⅓ for each offence. - £27 15 6⅔ do.	One half to the Judge who ſhall cognoſce the crime, and one half to the informer. do. do.
6. Whoever lays green lint in lochs or running burns 1685. 20.	£ 0 3 4 do. and confiſcation of the lint.	To the Kirk Seſſion, for the uſe of the poor of the pariſh.
7. Millers who ſlay ſmolts or trouts with creels or any other engine; or - - - Who dam or lave. - - *ibidem.*	The ſame puniſhment as the ſlayers of red fiſh, and when unable to pay the fines, to be impriſoned for a month, and fed at their own expence, or on bread and water.	
8. Any Judge *mentioned in the Acts*, who ſhall fail to put any of them into execution, when required perſonally to do ſo. - 1705. 2.	£27 12 6 and coſts of ſuing for it.	To the Purſuer.
9. The owner of *every* illegal cruive; or, Who allows cruives to ſtand in forbidden time; or, Who obſerves not the Saturday's ſlope, or, 1489. 15. Who is art and part in any of theſe offences. 1535. 16.	£ 8 4 for each offence. -	Half to the King, half to the informer.
10. Whoever uſes pock-nets, herry-water-nets, or other engines *not expreſsly allowed* by law, for catching any ſort of fiſh in the Forth above the Pow of Alloa. - 1698. 3.	£ 1 13 4 for each offence, or impriſonment at the diſcretion of the Judge. -	do. do.
10. Whoever deſtroys any LOBSTER from 1ſt June to 1ſt September. - 9th Geo. II. c. 33. § 4.	£ 5 0 0 for each offence. -	To any perſon proſecuting.

PART IV.

OF

PLANTING AND INCLOSING.

CHAPTER I.

Of making Plantings and Incloſures.——Of building Dykes and ſtreightening Marches, &c.——Deciſions on theſe ſubjects.——The Laws for the Preſervation of Plantings and Incloſures when made.

IN the arrangement of the laws under this title, thoſe which regulate the making of Plantings and Incloſures, ſhall be firſt conſidered; and in the next place, the proviſions for their preſervation when made.

There are a number of ſtatutes of the 15th and 16th centuries, requiring all heritors and tenants to plant wood and ſow broom in convenient places, in proportion to the extent of their poſſeſſions; and while penalties were exacted from the non-obſervers, premiums were held out to all who ſhould obey theſe laws. An Act paſſed ſo lately as the year 1661, ſeveral of the regulations of which will be ſoon taken notice of, declares the grounds incloſed in terms of the former ſtatutes, free of all burdens *and quarterings of horſe* for 19 years after that date. In this reſpect theſe ſtatutes are now obſolete, and the only one we know, ſtill abſolutely requiring fences to be made, is the 16th of Parl. 1669, ordaining that *all laboured land lying on the ſides of high-ways*, be fenced with dike

and ditch, or hedge, yet ſo as that no part thereof be within the ſtatuted breadth of the roads, viz. 20 feet at leaſt, or broader, if they have been ſo before, under certification that the Juſtices will cauſe poind in a ſummary manner, the labourers of ſuch land, to the extent of 4s. (i. e. 4d. ſterling,) for each ell not ſo fenced, to be applied towards fencing the ſame *. When this fence is made by hedge, cap. 9. of 7th Geo. II. provides, that when found by the ſurveyors of the roads, to be ſo high as to prevent the high-ways from getting the benefit of the ſun and winds, the Juſtices may order it to be cut to the height of three feet above the bank.

There are ſeveral ſtatutes ſtill in force for the encouragement of incloſing. Thus by 1661 c. 41, ratified by 1685 c. 39, it is enacted, that where incloſures fall upon the border of any perſon's inheritance, the adjacent heritors ſhall be at equal pains and charge in building, ditching, and planting that dike which parteth the inheritance. Power is thereby alſo granted to heritors and life-renters at ſight of the Sheriff, or Juſtices of Peace within their reſpective bounds, to caſt about the high-ways to their conveniency, provided they do not remove them above 200 ells upon their whole ground.

From theſe Acts, burgh and incorporate acres are excepted, and ſeveral queſtions have occurred upon their import. In 1669, it was found that although the lands were divided by a burn, yet one of the heritors might inſiſt that there be a dike alſo, at the common expence, but that it muſt be built in ſuch a manner, if either party demand it, as to allow the ſtripe of

* This ſtatute farther enacts, that whatſoever ſtones, rubbiſh, &c. or other impediments be found lying upon the high-way, or water turned in or dammed thereupon, ſhall be held as done by the labourers of the next adjacent lands, who ſhall be fined therefore by the Juſtices, and left to have recourſe upon the real actors of the ſkaith.

of water to run a ſpace without and a ſpace within the dike.

In 1679, it was found, that a neighbour was liable in the expence of building a march-dyke, in ſo far only as he received advantage from it, becauſe he had not been deſired to concur in the building.

In 1738, it was decided, that if the builder of the march-dyke fail to notify his intention to his neighbour, he muſt bear the whole expence himſelf; but if the other afterwards take the benefit of the dyke, he will become liable for his proportion. In the following year theſe Acts were found not to apply to ſmall feuers who had not above five or ſix acres of ground: and in another caſe, that when the conterminous heritors cannot agree about the ſort of fence to be erected, the Judge Ordinary muſt determine the queſtion. In 1758, the following circumſtances, viz. that the march-dike required to be repaired, was beneficial to the purſuer alone, for behoof of whoſe lands it had been formerly erected by the defender himſelf when proprietor of both eſtates; that it was now of no ſervice to his lands, which were all unincloſed and ſet on long tacks, were found inſufficient to free the defender of the half of the expence of upholding the dyke: but in 1784, the defence was ſuſtained that the defender's property was mountainous, barren, and of little value, and that it would not be meliorated at all in proportion to the expence of erecting the march dyke.

This claim of reimburſement is perſonal againſt the neighbouring heritor for the time and his heirs, and cannot affect a ſingular ſucceſſor, who purchaſes the ground with the incloſures thereon. It ſhould likewiſe be attended to, that the adjacent heritor is liable in half of the expence of planting the march fence as well as in that of erecting it.

That part of the Act about turning aſide the highways, was found by the Lords in 1713, to be perpetual,

tual, and they determined in 1724, that the perſon availing himſelf of that privilege, muſt make all the new road upon his own charges. In the year 1749, it was farther determined on this ſubject, that this enactment does not entitle any heritor to ſtop up a public road altogether without giving a new one, even though there be already another within 200 ells.

By 1669. 17. alſo ratified by 1685. 39. when any perſon intends to incloſe by dike or ditch, upon his march, the Sheriff, Juſtices of Peace, or other Judge Ordinary, is authoriſed when the ſaid march is uneven, or otherwiſe incapable of ditch or dike, to adjudge to the one or the other heritor, the ground which occaſions the inconveniency, ſo as to be the leaſt prejudicial to either party; compenſation in money being given for what is wanted of land; and the dike or ditch made along the adjuſted march, to be in all time the common march betwixt the lands.

In an action brought upon theſe ſtatutes againſt the poſſeſſor of an eſtate ſtrictly entailed, the Lords decerned, with this regulation, that the Land allotted to the defender falls under all the conditions of the entail; and that in caſe money ſhould be decerned to him, it ought to be tailzied or laid out on lands to be entailed in the ſame manner as the original eſtate: this caſe was determined in the year 1702, and in the 1754 and again in 1756, it was decided, that the Sheriff might enforce this Act between heritors of interjacent pieces of ground; of the quantity of ſeveral acres when the diviſion ſuits both, for beauty and utility.

Thus far with regard to the making of Planting and Incloſures, we now proceed to the enumeration of the proviſions made for their preſervation: ſeveral of theſe enactments have been anticipated in the firſt part, and it is conceived that ſome of thoſe which follow, may be alſo applied towards the better preſervation of the Game, as they level additional penalties

not

not only againſt poachers but all ſportſmen without exception, in certain ſituations.

By 1424. 33. they who in the night ſteal green wood, pull the bark off trees, or deſtroy woods, ſhall upon conviction pay 40s. (3s. 4d. ſterling,) for the unlaw and aſſythe the party. Breakers of orchards, ſtealers of fruit, deſtroyers of cunningaries and dow-cattes, to ſuffer the like puniſhment. Becauſe the wood of Scotland is utterly deſtroyed, the unlaw * thereof being ſo little; it is therefore ſtatute and ordained, that the unlaw of green wood, to any one *burning or ſelling* the ſame in time to come, be 5l. (8s. 4d. ſterling): and that both in regality and royalty, *the old unlaw for deſtroying green wood otherwiſe ſtand as before*, 1503. 71. The Act 1535 c. 9, requires every one to make three acres of hedges, and hainings, for every 100l. of land of new extent he ſhall be poſſeſſed of. For the puniſhment of thoſe who deſtroy green wood contrary to the tenor of this Act, chap. 10th of the ſame Parliament ordains, that all deſtroyers of green wood and new hanings, ſhall be proceeded againſt in terms of the former Acts made there againſt, and the penalty thereof in time coming, be 10l. (16s. 8d. ſterling,) for the firſt fault, 20l. for the ſecond, and death for the third offence; and failing payment, the offender to be impriſoned at the King's pleaſure: chap. 11th makes ſome particular regulations with regard to the King's foreſts, and farther enacts, that it ſhall be lawful for any baron or other landed man, to eſcheat for his own uſe, all goods of others found within his own haned woods or foreſts. By 1579 c. 84, breakers of yards or orchards, ſtealers of bees, or thoſe who pull or cut *haned broom*, ſteal, peel, or deſtroy green wood, without the good-will of the owner, are ordained to pay 10l. to the proprietor for the firſt offence, 20l. for the ſecond, and 40l. (3l. 6s. 8d. ſterling,) all *beſides damages*,

* *i. e.* The penalty applicable to the offence.

ges, and thoſe unable to pay, to be corporally puniſhed. The ſame penalties to be inflicted upon breakers of dove-cots, cunningaries (coney-warrens,) and parks, with this difference, that the third offence is puniſhable with death, if the defender be unable to pay.

By 1607 c. 3, whoever breaks down his neighbour's woods and park-dykes, fences, ſtanks or cloſures, to paſture within the fences, cut trees, *broom*, or *ſhear graſs* within the ſame, or break dove-cots or *ſteal bees*, or *fiſh within ponds*, ſhall at the option of the complainer be conveened before the Privy Council, or before the Judge Ordinary; in which laſt caſe, the penalty not to exceed 40l. Scots: without prejudice always to the execution of the former Acts made thereanent *.

In the year 1685, ſeveral people were tried capitally as garden-breakers, before the Court of Juſticiary, and condemned and executed. A ſentence, ſays Boyd, which is an outrage upon law. By 1661 c. 41. 1685 c. 39, whoever ſhall beat down the hedges or dykes of incloſures, *or be found within the ſame being a ſtranger*, ſhall be holden and repute a breaker down thereof, and pay 5l. for every fault. If not able to pay, he ſhall work ten days to the owner of the ground for meat and drink only. Item, that all perſons keep their cattle *and goods*, out of other people's incloſures, *at all times*, under the penalty of 5l. *toties quoties*, to be paid to the party damnified. And it is recommended to all Sheriffs &c. Juſtices of Peace, and *other Judges whatsoever*, to ſee the Acts put in execution, to grant proceſs at the inſtance of the parties damnified and to ſee reparation made.

By the latter ſtatute, no perſon ſhall cut, break, or pull up, any tree, or peel the bark off any tree under the penalty of 10l. (16s. 8d. ſterling,) for each tree which

* Would one be liable in this penalty, failing a proof on the other part, that it was for one or other of the purpoſes condeſcended on in the Act that he had contravened it?

within 10 years old, and 20l. for each above that age. *The havers or uſers of the timber of any tree ſo cut*, broken or pulled up, are declared liable to the ſame penalty, unleſs they can produce the perſon from whom they got it. And if the perſon convicted be not able to pay the fine, he is to be decerned to work a day for each half mark of the fine, to the heritor whoſe planting has been thus cut or broken. *Item*, that no perſon break down or fill up any ditch, hedge, or dyke, by which ground is incloſed; *or leap*, or ſuffer their horſe, nolt, or ſheep, to go over any ditch, hedge, or dike, under the pain of 10l. *toties quoties*; whereof half to the heritor, the other half for mending and repairing bridges and high-ways within the pariſh, at the ſight of the Sheriff or Juſtices of Peace before whom the contravener ſhall have been purſued.

In a proſecution upon this Act in the year 1785, for the breaking of hedges in hunting foxes, (this is the caſe alluded to on that ſubject in the firſt part,) the Sheriff decerned for the ſtatuted penalty, but the deciſion was reverſed by the Court of Seſſion, where this ſtatute was found to have gone into deſuetude, except in ſo far as it bettered the Act 1621 *; yet upon this enactment it is, that Boyd, in his *Judicial Procedure*, gives the form of a lybel againſt the deſtroyers of trees.

* If there be any Act of that year on this ſubject, it has eſcaped our obſervation.

CHAPTER II.

Of Poinding ſtrayed Cattle.——Of the requiſites of the Act of Herding and Deciſions on the Subject.——Of the mode of proving the Treſpaſs and Damages.——Of Pulling Bent &c. on Sand-hills.——Of Fences made in purſuance of any Act of Parliament.——How far theſe Laws concerning Fences apply to Poachers.

BY Parliament 1686, c. 11. all heritors, tenants, cottars, and others are enjoined to cauſe herd their horſes, nolt, ſheep, ſwine and goats, the whole year, *as well in winter as ſummer*, and in the night-time, to cauſe them be kept in houſes, folds or incloſures, that they may not eat or deſtroy their neighbours grounds, woods, hedges, or planting. Contraveners are to pay half a merk, (7⅛d. ſterling,) *toties quoties*, for every beaſt they have going on their neighbour's ground, *over and above the damage* done to the graſs or planting: and the heritor or poſſeſſor of the ground may detain the beaſts till he be paid the ſaid half merk for each beaſt found upon his ground, and for his expences in keeping the ſame; and this Act is without prejudice to former ones againſt deſtroyers of plantings and incloſures.

This Act is generally known by the name of THE ACT OF HERDING, and as it is the one which is generally lybelled upon in practice, deſerves particular attention. ERSKINE, when treating of *Poindings*, which he defines to be, that diligence, by which the property of the debtor's moveable ſubjects is transferred directly to the creditor who uſes it, ſays, that *the poinding* of horſes, cows, or ſheep, found in fields of corn or graſs, plantations or other incloſures, by the proprietor or poſſeſſor, does not transfer property, and

and was intended merely as a ſpur to tenants, to keep a watchful eye over their cattle, and as a compenſation to him whoſe corns &c. have ſuffered by the treſpaſs. The poſſeſſor of the grounds on which the cattle were ſeized, might, by our moſt antient cuſtom, carry them off, *brevi manu*, without a ſentence, to any houſe or fold belonging to himſelf, and detain them there for 24 hours. If the owner of the cattle did not, within that time, appear and make his claim, the poſſeſſor *might inſiſt* to have a value fixed by the ſtated appriſers of the barony, of the damage he has ſuffered, comprehending the maintenance of the cattle from the time they were ſeized, and *might retain one or more of them for himſelf*, in proportion to the appriſement, reſtoring the reſt to the owner, B. 3. 6. § 28.

ERSKINE does not mention how the ſeizer ſhould proceed, when the damages &c. do not extend to the value of one of the cattle, but when it does ſo, it appears from the paſſage above referred to, that he has not to apply to any Judge whatever, in order to obtain an indemnification, but may retain to himſelf as many of the cattle as he himſelf judges to be an equivalent to the amount of the damages pointed out by him to particular Officers of the bounds, and aſcertained by them, without the owner of the cattle being ſo much as called in to witneſs the tranſaction. Such are the powers conferred by our moſt antient practice, upon the poſſeſſor of the ground, intended, ſays ERSKINE, to act as "*a ſpur* to tenants to keep a watchful eye "over their cattle." This lawyer then proceeds to take notice of the ſtatute now under conſideration, and remarks, that, "though it does not give expreſs-"ly a right of detention for *the damage*, yet as that "right was competent to the poſſeſſor by our uſage "prior to the Act, it may be ſafely concluded that "the right continues in the poſſeſſor, *as the plain in-*

" *tention of the law was, not to weaken, but on the con-*
" *trary, to ſtrengthen the poſſeſſor's rights.*"

Having thus endeavoured to compare the common and ſtatute law on this ſubject, the detail of two caſes will ſuperſede any further obſervation on our part.

GOWAN and LANG, were tenants of two conterminous incloſures under different proprietors, *ſeparated by a fence capable of keeping in horſes or black cattle.* Gowan having his incloſure under tillage, purſued Lang before the Sheriff for damages and penalties on account of injury done his corn by the defender's ſheep. *The defender brought a proof, that he kept two herds who tended his ſheep night and day;* and urged moreover, that the Act ſpecifies as its object the preſervation of hedges, trees and incloſures, but makes no mention of corn: and farther, that the penalties are exigible only where the cattle treſpaſſing are caught in the fact and detained: the Lords found the defender liable in payment of the actual damage done to the purſuer's corn; but not in the penalties of the ſtatute. February 1794.

It does not appear whether this judgment proceeded upon the principle that the ſtatute is not applicable to corn fields, or that it applies only to caſes in which the beaſt has been ſeized in the act of treſpaſſing and detained: without pretending to give any opinion on the ſubject, we beg leave only to obſerve, that it ſeems to be ERSKINE's opinion, that the ſtatute is entitled to a liberal interpretation in ſo far as regards the former rights of the poſſeſſor of the ground: at any rate, it ſpecifies incloſures, and the field in queſtion ſeems to fall under that deſcription. The words of this part of the enactment are " Certifying ſuch as ſhall con-
" travene (in conſtantly herding their cattle, viz.),
" they ſhall be lyable to pay half a merk *toties quo-*
" *ties*, for ilk beaſt they ſhall have going on their
" neighbour's ground, by and attour the damage done
" *to the graſs or planting.*"

The

The report of the following caſe which is of a very recent date, will ſerve to ſhew in what manner the treſpaſs itſelf and the damage ſuſtained thereby fall to be proved.

An heritor in the neighbourhood of Montroſe, ſeized with his own hand, in one of his incloſures under corn, a horſe belonging to one of his tenants. In order to make the tenant more circumſpect in future, the landlord detained the horſe, and gave in a complaint to the Juſtices of Peace of the diſtrict, ſtating the fact, and praying them to appoint two appriſers to viſit the field and value the damage done to the corn, comprehending the expence of maintenance; and to grant warrant to poind * the horſe therefore, and the ſtatuted penalty.

The treſpaſs was denied, and the purſuer offered to give his oath to the fact, if required. To this it was objected, that the defender could never be made liable in an alledged treſpaſs ſupported merely by the purſuer's own oath: and to corroborate this objection, it was alledged; that the horſe in queſtion had been ſeized and the preſent complaint brought for no other purpoſe than to haraſs and oppreſs the defender. The Juſtices ordained the purſuer "to prove *by wit-*"*neſſes, the damage* done to his corns by the defen-"der's horſe at the time lybelled." This Interlocutor both they and their Clerk told the purſuer verbally and extrajudicially †, evidently implied an order of proof of the treſpaſs itſelf in the firſt place.

A reclaiming petition was then given in by the purſuer, in which he argued, 1ſt, That to hold a proof of the treſpaſs itſelf as included *by implication* in the Interlocutor as it ſtood, was ſtraining the plain meaning of

* The word *poind* is applied here for *ſell*, and perhaps inaccurately, but this circumſtance was rendered of no moment by the purſuer having given up the horſe upon caution.

† The general practice of the Court is, for the pleadings to be reduced to writing, which the Juſtices conſider and paſs judgment on, without calling in the parties concerned or their procurators.

of words very unneceſſarily, for had that been meant, it might have been eaſily expreſſed: but 2ndly, That no proof *by witneſſes*, was incumbent on the purſuer, of the extent of the damages, and much leſs of the treſpaſs itſelf. With regard to the damages, it was argued, the law itſelf points out the manner of proof, viz. not by witneſſes, but by appriſement at the ſight of the ſeizer, and the preſent application had been made to their Honours *tanquam viri boni & judices*, to appoint valuators in the room of thoſe alluded to by the law, ſo that the defender might have no pretence for objecting to the fairneſs of the valuation; and as the harveſt was at hand, it was now craved that this might at leaſt be done in the mean time, and the report to be ſealed up and lodged with the clerk to lie *in retentis*, until the point at iſſue ſhould be diſcuſſed. As to the treſpaſs itſelf, had the legiſlature meant to have impoſed any proof in ſuch caſes upon poſſeſſors, it would have permitted them to ſeize and detain ſuch beaſts only, as they ſhould find *and could prove*, were treſpaſſing on their lands; whereas as the law ſtands, it expreſsly authoriſes them *without any limitation or qualification whatever* to ſeize and detain *brevi manu*, as the purſuer has now done. Moreover, as the Act of Parliament founded on, requires all heritors, tenants, &c. to cauſe *herd* their *horses*, &c. all the year round, if the defender have complied with this expres injunction, the herd muſt have ſeen the beaſt ſeized at the time lybelled on, and can therefore depone whether it then was among the purſuer's corns or not: if no herd witneſſed the tranſaction, the defender either does not keep one at all, or he muſt have been off his duty at the time, and in either caſe, it was a fair concluſion that the horſe in queſtion was actually treſpaſſing when ſeized; that this preſumption can be redargued only by a contrary proof, either by witneſſes or by a reference to the purſuer's oath, which he was

ſtill

ſtill ready to give when required; and till the defender's herd ſhall be heard to depone that he ſaw the purſuer ſeize this horſe while not upon his grounds, no other mode of proof can legally be impoſed upon him.

The defender in his anſwers took no notice whatever of the purſuer's arguments with regard to the method of proving the extent of the damages; and as to the terms of the interlocutor reclaimed againſt, it was admitted that before permitting a proof of the alledged damage, one of the treſpaſs itſelf ſhould have been allowed, but it was contended that *on conſideration* the "Interlocutor ſerves for both, as before the "purſuer can prove the alledged damage, he muſt "prove the treſpaſs itſelf."

With regard to the burden of proof of the treſpaſs itſelf, it was ſaid, that "the mode of procedure ſug-"geſted by the purſuer, is ſomewhat ſingular, for "he would inſinuate, that, becauſe the law allows be-"ſtial to be ſeized when in the act of treſpaſſing, "it is incumbent on the defender to prove that the "mare *did not treſpaſs*, which would be to prove a "negative, which no law in the land ever allowed, "and your Honours muſt be ſenſible that the opera-"tions of the Act can never be allowed to take effect, "until a contravention take place, which if denied "muſt be proved *habili modo*. It is of no conſe-"quence whether the mare was herded or not to war-"rant the petitioner for ſeizing her, as in caſe he can-"not eſtabliſh that ſhe treſpaſſed, there can be no pre-"ſumption that ſhe did ſo, but that ſhe might have "been ſeized equally well in the defender's ground, "as among the purſuer's corns."

It was urged in reply, that it is not neceſſary to diſpute either the general rule of law, that no one is required to prove a negative, or the equity of the principle upon which this rule is founded, viz. that the law preſumes every man to be honeſt, and that, without

out evidence brought of guilt by the purſuer founding his plea upon that aſſertion, the defender falls to be abſolved; but before applying this to the preſent caſe, it was neceſſary to attend to the following part of the paragraph in which ERSKINE lays down theſe general rules; he immediately adds, (B. 4. 2. § 36,) that "all *præſumptiones juris*, whether of this laſt kind (of "innocence, viz.) or other preſumptions ariſing from "the ſuppoſition of certain facts, *may be elided*, not "only by a direct contrary proof; but *by contrary* "*pregnant preſumption; for a preſumption is nothing* "*more than a conjecture*, or ſtrong probability *inferred* "*from what commonly happens;* and all conjectures "built upon common events muſt loſe their force, "when others, ariſing from extraordinary or uncommon occurrences, afford a ſtronger degree of probability to the contrary. Many inſtances accordingly occur, both in the Roman law and our own "practice, (here ſeveral deciſions are quoted,) in "which *the preſumptions of law have been elided by* "*more forcible preſumptions on the other ſide.* The legal "preſumption for life, was, by a late deciſion, overruled, barely upon fame or common report: which "itſelf is no more than a preſumption that may be "elided by a direct contrary evidence."

From this doctrine the purſuer inferred, that it is left with the Judge to weigh the whole preſumptions on both ſides, before he determine on which the preſumption of law lies; and that if in the caſe alluded to by ERSKINE, the preſumption of life itſelf was over-ruled, "barely upon fame or common report:" the preſumption of the innocence of the defender in the preſent caſe, muſt be much more eaſily ſet aſide, when inſtead of "*bare report*, the *poſitive fact* "is not pretended to be denied, that the horſe in queſtion when ſeized by the purſuer, was at liberty to "roam at large, *not being herded as the Act of Parliament expreſsly requires.*" And when to this was added

added the unlimited and unqualified power of detention conferred by the legiſlature on all poſſeſſors of the ground in general, in caſes like the preſent, the whole formed ſuch a chain of preſumptive evidence, that, if ever there were occurrences ſufficiently extraordinary and uncommon preſumptions ſufficiently pregnant, to do away the effects of a general rule, founded on nothing more than a conjecture, it muſt be in the preſent caſe.

But the point is ſtill more clearly elucidated, if poſſible, it was added, in the following paragraph of the ſame author, where drawing a compariſon betwixt the *preſumptiones juris*, and thoſe *hominis vel judicis*, he ſays, "the former are thoſe laid down in our ſtatutes or "eſtabliſhed by cuſtom and deciſions: whereas the "latter daily emerge from the various circumſtances "of the ſpecial caſes, and on which it is the duty of "a Judge, to lay more or leſs weight, according to "the ſeveral degrees of evidence they carry with "them. *They have frequently the force to over-rule a "preſumptio juris, eſpecially when it is of that kind, "which owes it's whole force to the want of contrary "evidence.* Thus, a deed may be declared forged "from a concurrence of circumſtances tending to in-"validate it, *notwithſtanding the preſumption of law "that all deeds are genuine.*" In like manner, was it contended, muſt this treſpaſs be preſumed to have taken place, from the ſtrong concurrence of circumſtances tending to ſhew it *notwithſtanding the general preſumption of law in favour of innocence.* Yet as it is remarked by ERSKINE, in the caſe above mentioned, that the fame or common report of death "is no more "itſelf than a preſumption that may be elided *by direct "contrary evidence*," ſo might no doubt, the preſumption of this treſpaſs be done away by a direct contrary proof; the Act of Parliament indeed, requires the owner of the cattle to have always one witneſs at leaſt, in the perſon of his herd to ſubſtantiate his aſſertion;

but talking of preſumptions, it ſeemed to the purſuer, ſo far as he was capable of drawing concluſions from what commonly happens, as ERSKINE expreſſes it, and from the natural propenſity of the animal, to be the plain preſumption of common ſenſe, that a hungry horſe unherded, will always prefer eating oats when he can get at them, to nibbling graſs at the dyke ſides.

The Juſtices adhered to their judicial interlocutor as well as to their extrajudicial explanation of it. The purſuer then craved, that in order to leave neither party room to diſpute farther about the import of their order, they would condeſcend to explain its meaning in a judicial manner, in ſo far at leaſt, as to let it be exactly known to what extent a proof was required. The Judges peremptorily refuſed to do more in the matter, whereupon the purſuer appealed to the Quarter Seſſions, becauſe, that under the circumſtances of the caſe, no proof whatever by witneſſes, was incumbent on him; and that though the parties differed in their interpretation of the firſt interlocutor, every judicial explanation thereof was refuſed, the purſuer having been *verbally* only and *extrajudicially* informed, that it *implies* a proof, by witneſſes, of the treſpaſs itſelf, as well as of the damages ſuſtained.

For the better underſtanding the principles upon which the arguments in this caſe are founded, it has been thought neceſſary to give the pleadings at ſome length, but the detail of the appeal ſhall be more conciſe.

It was urged in the anſwers to the reaſons of appeal, 1ſt. The Act lybelled on confers no juriſdiction on the Juſtices of Peace, they are conſequently incompetent Judges in the caſe. 2ndly, An appeal is incompetent *in hoc ſtatu*, there having been no deciſion on the merits, but only an order before anſwer: but at any rate, 3dly, The Juſtices have very properly ordained

dained the purſuer to prove by witneſſes, *the alledged treſpass and damages.* The general powers conferred upon Juſtices, by 1617 c. 8. § 8. were alluded to, in anſwer to the firſt objection. A caſe reported in Dict. v. III. *voce* Appeal, allowing ſuch appeals to be competent, in ſo far as to ſtop final execution though not to bar the Juſtices from proceeding in the meantime if they thought fit, was quoted to do away the defenders ſecond objection; and with regard to the third, it was ſaid the Juſtices of Montroſe, had no doubt acted with ſingular propriety and wiſdom, in having given ſuch an extrajudicial explanation of their judgment in this cauſe as they would not acknowledge on the bench; and in having peremptorily refuſed to give any judicial explanation of an interlocutor, which even the defender had agreed to be ambiguous: as to the propriety of their requiring any proof whatever, by witneſſes, on the appellant's part, none was incumbent on him, neither of the damages, becauſe,

1ſt. The mode of aſcertaining them is pointed out by the common law, and ſo far from any new regulation being made by this ſtatute, which was intended to eſtabliſh the poſſeſſor's rights, it does not even take any notice whatever of the damages; the former method therefore, viz. not by witneſſes, but by appriſement, at the ſight of the landlord himſelf, was meant to be continued.

2ndly. The defender has all along acquieſced in this argument, nor were any objections made to the interim appreciation which nevertheleſs was not allowed: nor of the treſpaſs, becauſe,

1ſt. This ſtatute paſſed for the very purpoſe of ſtrengthening the poſſeſſor's rights, does in no reſpect reſtrict the unlimited powers of ſeizure and detention then enjoyed by all poſſeſſors of the ground without exception; conſequently this right was meant to have been confirmed along with their other privileges, corroborated by an additional penalty.

2ndly. The ſtatute requires beſtial to be conſtantly herded; this having been neglected here, the defender therefore, cannot be heard to plead the preſumption of innocence of the breach of a ſtatute, the very intention of which he has counteracted; on the contrary, the preſumption of law muſt lie on the ſide of the appellant, from his having been allowed to carry off the beaſt without any oppoſition, as well as from the circumſtance of the defender not having kept a herd.

Here it was remarked from the bench, that the appellant having thus acquired poſſeſſion of the horſe, afforded ſuch a preſumption of a treſpaſs, as could only be redargued by poſitive evidence to the contrary, without which, the ſtatuted penalty was forfeited; but no damages could be allowed excepting in ſo far as eſtabliſhed by the teſtimony of witneſſes, and as the interlocutor appealed from requires nothing more, the appeal ſhould be diſmiſſed.

With regard to the mode of aſcertaining the damage, the appellant now urged the former practice, eſtabliſhed by our moſt antient uſage, and tacitly confirmed by the ſtatute; but this argument was over-ruled from the bench, in reſpect of the preſent practice; it was then craved that the principle of the deciſion might be taken down in the interlocutor, as one of the chief reaſons of appeal was to obtain an explanation of the order made at Montroſe, and the irregular one given there, both by the Judges themſelves as well as thro' the medium of their Clerk, approved or rejected in a judicial manner. This too was declined, though not without a diviſion on the bench, and the appeal was diſmiſſed *ſimpliciter*.

The field of oats treſpaſſed on, was now reaped, and the purſuer reſtricted his claim to the ſtatuted penalty and expences of maintenance of the horſe, and of proceſs; the defender on the other hand contended, that he ought to be abſolved with exemplary coſts, ſeeing

ſeeing it had not been even attempted to bring evidence, either that a treſpaſs was committed or damages ſuſtained. The purſuer then ſtated what had been ſaid from the bench at leaſt, and not extrajudicially, at the Quarter Seſſions, and prayed to be heard before judgment, if the Juſtices had any heſitation in decerning as he required. After another month's deliberation, the parties procurators were heard, and the following judgement pronounced, "Montroſe 8th "December, 1800. The Juſtices having reſumed "the conſideration of this proceſs, and heard the "parties procurators fully thereupon, *they adhere* to "their interlocutor of the twenty-ſixth day of Au"guſt laſt, (ſee page 61,) and allow the petitioner to "prove by witneſſes betwixt and the eight day of "January next, *the treſpaſs committed* by the defen"der's beaſt upon the petitioner's grounds at the time "lybelled, *and the damages* done to his corns, with "certification."

As the Court was cleared, even of the parties procurators themſelves, when this order was made, we cannot ſtate the opinions of the Judges upon which it proceeded.

In order that the whole cauſe might return at once to the Quarter Seſſions, the purſuer declined leading the proof required, decreet of abſolvitor with coſts was of courſe craved for the defender, and in that ſtate the matter preſently reſts.

Without preſuming to anticipate the final judgment in this caſe, we beg leave to offer a few remarks upon its general merits in ſo far as relates to our preſent ſubject. If in every caſe of treſpaſs, the want of a vigilant herd on the part of the owner of the cattle, be ſufficient to make him forfeit the common preſumption of law in favour of innocence, and to infer a treſpaſs; while the ſeizer, at the ſame time, can recover damages in ſo far only as he ſhall be able to ſubſtantiate them by ocular evidence of the fact; two diſtinct

caſes

caſes will be eſtabliſhed in the pounding of ſtrayed cattle; one, in which the pounder is entitled to the ſtatuted penalty only, with the expence of maintenance; and another, in which he may recover alſo the damages ſuſtained: a diſtinction this, which, with the utmoſt deference to the opinion of Judges ſo reſpectable as are thoſe before whom this queſtion has been agitated, we ſhould be inclined to think, not altogether well founded. It has been already noticed, that the ſtatute in queſtion, paſſed for the very purpoſe of ſtrengthening the poſſeſſor's rights, points out no new method of proof to be followed by the party injured; and beſides, with regard to the damages, it ſhould be attended to, that it is not upon this enactment at all that ſuch a claim is founded, except by implication, but upon the uſage prior to the Act, and which it tacitly corroborates. If the former practice then be ſupported as the foundation of a claim of damages, why deviate from the mode of aſcertaining them pointed out and regulated by the ſame uſage?

The method thus eſtabliſhed of aſcertaining this point ſeems of itſelf ſufficiently to indicate that the ſeizer of the beaſt has no occaſion for witneſſes to inſtruct the treſpaſs any more than the extent of the damages, it being left to himſelf to point out to the appriſers the injury he has ſuſtained. Indeed, to require any witneſſes on this point, when the animal has been allowed to be carried off without moleſtation, and the owner does not pretend he kept a herd, would be doing away the very purpoſe of this ſtatute, by putting thoſe who attend to its injunctions in conſtantly herding their cattle, on the very ſame footing with thoſe who diſregard them; and conſequently, inſtead of enforcing herding of cattle, the poſſeſſors of the ground would be laid under the grievous neceſſity of placing guards in every field, to protect it from depredations: while on the other hand, no danger can enſue from the malice of their neighbours, to

thoſe

thoſe who herd their cattle as the law requires; for the ſeizure of beſtial on the property of another is theft, and the herd is at hand, either to oppoſe the thief, or to raiſe the hue and cry after him; who, in either of theſe caſes, muſt no doubt free himſelf by the evidence of credible witneſſes, of the ſerious accuſation of having feloniouſly carried off the beaſts in queſtion; but if the herd allow them to be carried off without oppoſition, his maſter muſt ſurely ſtand by the conſequences of the negligence of the ſervant, to whom he has committed the care of his cattle. Under theſe circumſtances therefore, it is conceived that it is the keepers of vigilant herds and they alone, who are entitled to plead a preſumption of innocence, in queſtions of this nature; and that upon no other footing, can the poinding of ſtray-cattle, *brevi manu*, anſwer the end propoſed by it, viz. "of "being *a ſpur* to tenants to keep a watchful eye over "their cattle, and affording a compenſation to him "whoſe corns, graſs or plantations have ſuffered by "the treſpaſs."

This ſubject has been treated of here, with ſo much the more attention, as we underſtand it to be the general practice, of the Sheriff Court of Forfar at leaſt, we are aſſured it is, invariably to require the poinder of cattle found, treſpaſſing, to prove by witneſſes, both the treſpaſs and damages: this practice appears to be founded neither upon the ſtatute nor the common law, but merely upon the acquieſcence of the parties in the order of proof enjoined them, and conſequently not to be inſiſted on, when the party intereſted is no longer inclined to acquieſce in it. According to the uſual method of lybelling upon this ſtatute, ſuch an appointment is no doubt proper, in order to ſatisfy the Judge of the truth of the premiſes from which it is ſubſumed or concluded, that he ſhould decern and ordain againſt the defender; but it is left to the determination of thoſe of more knowledge and experience

perience than it becomes us to pretend to, whether ſuch a form is to be preferred, or that adopted in the above caſe; of ſimply narrating that the beaſt was ſeized in the act of treſpaſſing and is detained for payment of the penalty &c. which it has been ſeen it is competent for the poſſeſſor of the ground to do, without any warrant of a judge; and praying only, that appriſers may be appointed for fixing the amount of the damages &c.: and it is farther ſubmitted, whether upon ſuch an application, it is competent for the Judge to take any cogniſance of the truth of the allegation that a treſpaſs was committed and damages ſuſtained, as done by the Juſtices in the Montroſe caſe, and acquieſced in by the parties; or to do more than merely to grant or refuſe the prayer of the petitioner laid before him.

It muſt be attended to however, that in every queſtion of this nature, the poinder of the cattle ought to put them into a poind fold, or other place, where they have fodder and water, and ought recently to acquaint the owner, if known, that he may relieve them: if he act otherwiſe, he will incur the pains of a ſpuilzie, viz. reſtitution, with all the profits which the injured party ſhall ſwear he has loſt by the detention: Erskine.

We ſhall now proceed to take notice of the other ſtatutes under this head. By 1695 c. 30. the pulling of bent, broom, or juniper off ſand-hills, is prohibited, *either by the proprietors themſelves or any others whatſoever*, the ſame being the natural fences of the country adjacent to ſaid hills; under the certification, that the contraveners ſhall be liable in all damages that ſhall enſue, and alſo in the ſum of 10l. (16s. 8d. ſterling,) the one half *to the informer*, the other half to the judge within whoſe juriſdiction, the offence ſhall have been committed. This Act mentions in its preamble, that the Barony of Cowbin, in Elginſhire, was entirely deſtroyed and covered with ſand, owing to ſuch practices as it prohibits.

The

The laſt regulation relating chiefly to fences is that of 9th Geo. III. c. 29, which enacts that any perſon wilfully or malicioufly demoliſhing, pulling down *or otherwiſe deſtroying or damaging, any fence* made for dividing or incloſing any common, waſte or other lands or grounds in purſuance of any Act of Parliament, or ſhall cauſe or procure the ſame to be done, ſhall be guilty of felony, and liable to be tranſported for ſeven years; but the proſecution muſt be commenced within eighteen months after the offence.

As ſeveral of theſe Acts are directed againſt all perſons without exception, who leap over the dikes or are found within the incloſures of others without permiſſion, it was already ſuggeſted that ſeveral of them might perhaps be effectually employed as farther checks upon poachers. The intereſt of the heritors alone indeed, ſeems to be attended to in moſt of them; but if it is the proprietor only who is entitled to purſue upon theſe ſtatutes, may not a tenant by leaſe, have recourſe againſt his landlord in caſes of treſpaſs upon his fences, in conſequence of the obligation in his tack to be kept in quiet poſſeſſion; and without ſuch reſerved powers in their tacks, are the landlords themſelves entitled to enter the incloſures of their tenants in purſuit of game, far leſs to authoriſe others to do ſo, without the tenants conſent? In England ſuch a right is always reſerved to the landlord.

CHAPTER III.

Statutes and Deciſions chiefly applicable to the Preſervation of Planting and Fruit Trees.——Of Nursery Plants.——Table of Offences againſt Planting and Incloſures, and the applicable Penalties.——Concluſion.

A FEW ſtatutes ſtill remain to be enumerated relating more particularly to the preſervation of planting and trees. By 1698. 16. all former Acts made for planting and incloſing of ground are ratified and approved of, and all tenants and cottars are farther ordained to preſerve growing wood and planting upon the ground they poſſeſs, and that none of it be cut, broken, or pulled up by the roots, or the bark peeled off, under the pain of 10l. Scots, (16s. 8d. ſterling,) for each tree under ten years old, and 20l. Scots, for each above that age; *to be exacted by their masters only.*

In two proſecutions upon this Act, both decided in July 1734, it was found in the one, that growing timber cut or deſtroyed on a tenant's poſſeſſion, is preſumed to have been ſo by the tenant, unleſs he can inſtruct that it was done by a third party; and in the other caſe, that a great number of trees growing naturally in a glen, proved to have been deſtroyed during the defender's poſſeſſion, were not to be comprehended under the meaning of growing wood upon the defender's poſſeſſion, which, in terms of the ſtatute, he was bound to have preſerved, becauſe the glen in queſtion had been in uſe to be paſtnred upon by horſe, nolt, and ſheep, as well before as ſince the defender's poſſeſſion; that theſe trees had not been preſerved in time bygone to be cut for ſale, and were not of ſuch value as to be worthy of preſerving and ſecuring for ſale.

By

By ſtatute 1 Geo. I. Seſſ. 2. c. 18 it is enacted, that if any ſhall maliciouſly break down, cut up, bark, deſtroy or ſpoil any timber tree, *fruit-tree*, or other tree, the perſon damaged ſhall receive ſatisfaction from the inhabitants of the town, hamlet, ville or place, to be recovered by way of ſummary action, as damages in other caſes of riot; unleſs the party offending ſhall be convicted by ſuch pariſh &c. within ſix months. Upon complaint made by the pariſh, hamlet &c. or by the owner of the trees, *or by any other*, to two or more Juſtices of Peace; the offender, when convicted, is to ſuffer impriſonment and whipping, and is not to be diſcharged till he find ſureties for his good behaviour for two years. By the ſame Act, if any perſon maliciouſly ſet on fire, burn or cauſe to be burned, any wood, underwood or coppice, he is to ſuffer as a wilful fire raiſer *.

In the 1719, a Mr. Naſmyth proſecuted the inhabitants of the village of Water of Leith, upon this Act, and the Lords found the clauſe, "that the inhabitants of ſuch pariſh, ville &c. where trees are deſtroyed ſhall be liable for the damages," relevant, to make the defenders liable *in ſolidum*, without relief from the reſt of the pariſh; that the purſuer's tenement lies within or is apart of the ville or hamlet, called the Water of Leith; but that before execution againſt the perſons liable, *competent time* ought to be allowed for the defenders to meet and ſtent themſelves for making up the purſuer's damages, and for proportioning relief to ſuch as ſhould be obliged to pay more than their ſhare: and with regard to the damage done to that part of the purſuer's tenement not immediately comprehended in the hamlet, the defenders were found liable *in ſolidum* for theſe alſo, but with relief againſt the inhabitants of the whole pariſh, allowing them time

* A capital crime by 7 Ann. 20.

before execution, to meet and proportion the ſaid relief amongſt themſelves.

In July 1743, the Lords found that fruit-trees fall under the Acts for the preſervation of planting, and in 1784, that natural and coppice wood does ſo likewiſe. In 1781, it was decided, that the proprietor of a row of trees adjoining to a mutual wall, is bound to lop their branches in ſuch a manner as to prevent them from overſhadowing the ground of the conterminous heritor. Trees planted and which have taken root in the ground, become the property of the owner of the ground as an acceſſory, Ersk. B. 2. 1. 15.

The two following ſtatutes on this head, deſerve more attention than all the reſt. By 6th Geo. III. c. 36, thoſe who ſhall in the *night time*, ſpoil, deſtroy or carry away any timber-tree, or pluck up, ſpoil, deſtroy or carry away any root, ſhrub or plant of the value of 5s. growing in a nurſery *or other inclosed ground*, ſhall be deemed guity of felony, ſo as to ſuffer tranſportation for the ſpace of ſeven years; and thoſe who are wilfully abetting and aſſiſting, ſhall ſuffer the ſame puniſhment.

Chapter 48th of the ſame Seſſion enacts, that whoever defaces, damages, deſtroys, or carries away any timber tree or part thereof, ſhall, for the firſt offence, forfeit ſuch a ſum, not exceeding 20l. as to the Juſtice ſhall ſeem meet, with coſts; and upon non payment, the offender ſhall be committed to jail, there to remain till the penalty and charge be paid, but not exceeding twelve months. A ſecond offence ſhall entitle the Juſtice to fine the offender not exceeding 30l. and to commit him to priſon until the fine and coſts be paid, but not exceeding eighteen months. The third offence declared felony; and the Court in which the crime is tried, is empowered to tranſport the felon to America for ſeven years. Thoſe who ſpoil, deſtroy or carry away any root, ſhrub or plant, from nurſeries

or

or other cultivated land, ſhall forfeit for the firſt offence, a ſum not exceeding 40s. beſides coſts of ſuit: for the ſecond offence, not exceeding 5l. The third offence to be felony, with power of tranſportation for ſeven years. Thoſe who ſpoil, damage or deſtroy, *any kind* of underwood, *poles* or *ſticks of wood*, green ſhrubs, or young trees, or carry away the ſame, *or have in their cuſtody* any of the above particulars, *without giving a ſatisfactory account how they came by the ſame*, ſhall forfeit, for the firſt and ſecond offences, the ſame as the ſpoilers of roots &c. above mentioned, and for the third offence be deemed and puniſhed *as incorrigible rogues*. This puniſhment is confinement to hard labour in a houſe of correction for any term not exceeding two years nor leſs than ſix months, and *whipping* in ſuch manner and at ſuch times during the confinement as to the judge ſhall ſeem proper: ſee Boyd's Juſtice B. 1. 7. ERSK. 4. 4. 39. makes it death but that is in terms of an old ſtatute now probably obſolete.

Every offence againſt this Act, it is thereby enacted, may be proved by the oath *of one or more* credible witneſſes before any one Juſtice of Peace. Where the forfeitures are not paid down *upon conviction*, the offender may be committed to hard labour for one month upon the firſt offence, and to be once whipped; for three months for the ſecond offence, and to be thrice whipped. It may have been obſerved however, that the period of impriſonment is fixed in a former part of the Act, in caſe of non payment of the pecuniary penalties applicable to the offences it firſt particulariſes.

The Act 1617 c. 8. confers the ſame powers on Juſtices of Peace for the execution of the laws under this title as it does with regard to thoſe relating to fiſhings, for which ſee page 49, and here, we ſhall cloſe this book of quotations, with that well known one

one from HORACE, the firſt part of which in particular, we beg leave to addreſs to every one who ſhall have taken the trouble of peruſing theſe pages:

VIVE, VALE; SI QUID NOVISTI RECTIUS ISTIS,
CANDIDUS IMPERTI: SI NON, HIS UTERE MECUM.

FINIS.

D. Buchanan,
Montroſe.

T A B

Of OFFENCES AGAINST THE LAWS OF

APPLICABLE P

Offence.	P
	Sterling.
1. Stealing, peeling or deſtroying green wood, or *bees*, or pulling or cutting hained broom; or, Breaking yards or orchards. - A& 1579 c. 84. N. B. There are ſeveral prior A&s on this ſubject taken notice of on page 55, but their proviſions are entirely ſuperſeded by ſubſequent ſtatutes.	£ 0 16 8 for t the ſecond, 3l *damages*, and f niſhment.
2. Whoever breaks down his neighbours woods and park dykes, fences, ſtanks, or cloſures, to paſture within the fences, cut trees, *broom* or *ſhear graſs* within the ſame. 1607 c. 3.	Not above 3l. 6s.
3. Whoever beats down the hedges or dikes of incloſures; or, *is found within the ſame being a ſtranger*. 1661 c. 41.—1685 c. 39.	£ 0 8 4 each days work for
4. Whoever keeps not his cattle and goods out of other people's incloſures *at all times*. 1661. 41.—1685. 39.	£ 0 8 4 for e
5. The cultivators of laboured land lying on the ſides of highways, not fenced with dyke and ditch or hedge. 1669. 16.	£ 0 0 4 for e
6. Whoever cuts, breaks, or pulls up any tree, or peels the bark off any tree; or, - -	£ 0 16 8 each £ 1 13 4 for e ment, one day' fine.
7. Who *has* or *uſes* the timber of any tree ſo cut &c., unleſs he produce him from whom he got it. 1685. 39.	
8. Whoever breaks down or fills up any ditch, hedge, or dike incloſing ground; or, Who *leaps*, or ſuffers his horſe, nolt or ſheep to go over any ſuch ditch, &c. - 1685. 39.	£ 0 16 8 for
9. Whoever herds not his cattle the whole year round; or, Who does not keep them in houſes folds or incloſures in the night-time; for every beaſt going in his neighbour's ground, without prejudice to former A&s. 1686. 11.	£ 0 0 7⅛ for and expences o
10. Whoever *pulls* bent, broom, or juniper off ſand-hills, whether the proprietor or any other perſon. 1695. 30.	£ 0 16 8 for e mages that ſhal
11. Whoever *wilfully* or *maliciouſly* demoliſhes, pulls down, *or otherwiſe deſtroys or damages* any fence dividing or incloſing any common, waſte *or other lands* or grounds in purſuance of any A&t of Parliament; or, Who ſhall cauſe the ſame to be done. 9th Geo. III. c. 29.	Felony and tranſp
12. Where growing wood and planting is cut, broken, or pulled up by the roots, or bark-peeled, the tenant on the ground where committed: - - 1698. 16.	£ 0 16 8 per 13s. 4d. for ev
13. Where any timber tree, fruit-tree *or other tree* ſhall be maliciouſly broken down, cut up, barked or deſtroyed; unleſs the offender be convicted by the town village, or pariſh &c. within ſix months. - 1 Geo. I. Seſſ. 2. c. 18.	Reparation of da village, or pla
14. Whoever is convicted of the offence at the complaint of the town, village, pariſh, &c. or of the owner of the trees, or *of any other perſon*. - *Ibidem.*	To ſuffer impriſo to be diſcharg his good behav
15. Whoever maliciouſly ſets on fire, burns or cauſes to be burned any wood, underwood or coppice. - *Ibidem.*	Death as a wilful
16. Whoever, *in the night time* ſpoils, deſtroys or carries away any timber tree, or plucks up, ſpoils, &c. any root, ſhrub, or plant of the value of 5s. growing *in any incloſed ground*; or, Who wilfully abetts and aſſiſts in ſo doing. 6th Geo. III. 36.	Felony and tranſp
17. Whoever defaces, damages, deſtroys or carries away any timber-tree, or any part thereof. 6th Geo. III. c. 48.	Not above 20l. a 30l. and do. f portation for ſe
18. Whoever ſpoils, deſtroys, or carries away any root, ſhrub, or plant from nurſeries *or other cultivated land*. *Ibidem.*	£ 2 0 0 and the ſecond, felo
19. Whoever ſpoils, damages, or deſtroys any kind of underwood, poles, ſticks of wood, green ſtubs or young trees, or carries away the ſame; or, Whoever *has in his cuſtody* any of theſe articles, without being able to give a ſatisfactory account how he came by them. *Ibidem.*	do. do. for confinement in any period not be whipt durin of the Judge,

End of Table

B L E

OF PLANTING AND INCLOSING, AND THE E PENALTIES.

Penalties.	Application.
for firſt offence, 1l. 13s. 2d. for d, 3l. 6s. 8d. for the 3d. *beſides* and failing payment, corporal pu- - -	To the party injured.
3l. 6s. 8d. -	do.
each fault; failing payment, ten k for meat and drink. -	do.
for each offence.	To the party injured.
for each ell. -	Towards fencing the ſame.
each tree under ten years old. for every other tree; failing pay- e day's work for each 7½d. of the - -	To the Party injured.
for each offence.	Half to the Heritor, half for mending bridges and high-ways within the pariſh.
for each offence, beſides damages nces of maintenance till paid.	To the party injured.
for each each offence, and all da- at ſhall enſue. -	Half to the informer, half to the Judge who convicts.
tranſportation ſeven years.	
8 per tree under ten years old, 1l. for every other.	To the landlord.
of damages ſuſtained by the town, or place &c.	To the party injured,
mpriſonment and whipping, and not liſcharged till he find ſureties for behaviour for two years.	
wilful fire raiſer.	
tranſportation for ſeven years.	
20l. and coſts for firſt offence; nor do. for ſecond, felony and tranſ- for ſeven years, for the third.	To the King.
and coſts for firſt offence; 5l. for d, felony &c. as above, for the third.	do.
for firſt and ſecond offence, and ent in the houſe of correction for od not exceeding two years, and to t during that time, at the diſcretion udge, for the third tranſgreſſion,	do.

Table Third.

Corrections and Additional Remarks.

Page 8th line 30th, for *extended* read *extend.*
Page 10th line 1ſt of the argument, for *Poacher who*, *Poachers who.*
Page 12th add NOTE, after the detail of the proviſions of the Act 1707. 13.

☞ The Act of 1621 fixing the qualification, is ſurely included in this general ratificaton, nor is any part of that ſtatute *directly* revoked or altered by this; yet the power of licenſing common fowlers by a ſubſcribed warrant is here mentioned as already eſtabliſhed and inherent in *every* proprietor with regard to his own grounds! I have not been able to diſcover any intervening regulation on the ſubject, conferring this privilege on heritors; ſhonld preſume therefore, either that the Act of 1621 was never ſo literally interpreted as to take from landlords the power they then enjoyed of licenſing others to hunt on their eſtates, or that the power alluded to in the ſtatute of 1707 muſt be conſidered as applicable only to the appointment of Gamekeepers, who, it ſhould be recollected, are authoriſed to kill Game ſolely for the uſe of the heritor. At any rate, it appears clear notwithſtanding the general expreſſion of this Act, that as the right of killing Game at all in one's own right, is confined to the proprietor of a plough-gate, ſuch an one alone is entitled to give another a licence to do ſo.

Page 15th 2d line from the bottom, for *oaths* read *confeſſions.*

☞ In part of the impreſſion of the Table belonging to Part I. the penalty of N° 24 and its application, are confounded with thoſe of N° 25.

Page 27 line 3d. for *rabbet* read *rabbit.*
Page 34 line 3d. for *locks* read *lochs.*
Page 45 line 2d. dele *that.*

Corrections and Additional Remarks.

Page 61 line 21ſt. for *alledged* read *inſinuated.*
Page 68 line 9th. from the bottom, for *approved* read *approved of.*

☞ Page 70. It is not the claim of damages but the right of detaining the beaſt for theſe damages which is founded *by implication only* on the Act here alluded to, conſequently the concluſion drawn from that ſtatement is falſe; but it is thought that the reaſoning will be equally applicable when this miſtake is corrected and the paſſage read thus; from the end of the 12th line, *and beſides, with regard to the damages, it ſhould be attended to, that it is not upon this enactment alone that ſuch a claim is founded, but likewiſe upon the uſage prior to the Act, which it corroborates. If the former practice then be continued as the foundation of of a claim of damages, why deviate from the mode of aſcertaining theſe damages regulated by the ſame uſage, the more eſpecially when no other method has been ſince pointed out.*

☞ As this Act is without prejudice to former ones, that of 1661 c. 41, ſeems to merit particular attention: ſee Table III. Nº 4.